SHDKT PROCEEDINGS AND ORDERS DATE: [07/06/94]

CASE NBR: [93106047] CSY STATUS: [DECIDED]
SHORT TITLE: [Wills, Bobby Joe]
VERSUS [Texas] DATE DOCKETED: [091493]
*** CAPITAL CASE -- No date of execution set *** PAGE: [01]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Sep 14 1993	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Feb 25 1994		Brief of respondent Texas in opposition filed.
4	Mar 3 1994		DISTRIBUTED. March 18, 1994 (Page 20)
6	Mar 21 1994		REDISTRIBUTED. March 25, 1994 (Page 14)
8	Mar 28 1994		REDISTRIBUTED. April 1, 1994 (Page 12)
10	Apr 11 1994		REDISTRIBUTED. April 15, 1994 (Page 27)
12	Apr 18 1994		REDISTRIBUTED. April 22, 1994 (Page 15)
16	Apr 25 1994		REDISTRIBUTED. April 29, 1994 (Page 13)
18	May 9 1994		REDISTRIBUTED. May 13, 1994 (Page 27)
20	May 16 1994		Petition DENIED. Concurring opinion by Justice O'Connor. Dissenting opinion by Justice Blackmun. (Detached opinion.)

****

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

93-6047

BOBBY JOE WILLS,

Petitioner,

v.

THE STATE OF TEXAS

Respondent.

ORIGINAL

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner Bobby Joe Wills moves this Court for leave to file the attached Petition for Writ of Certiorari to the Texas Court of Criminal Appeals without prepayment of costs and moves to proceed in forma pauperis. An affidavit in support of this motion is attached.

Respectfully Submitted,

BOBBY JOE WILLS

By: _____

Michael B. Charlton
550 Westcott
Suite 320
Houston, Texas 77007
(713) 864-0660

Supreme Court, U.S.
FILED
9-14-1993
OFFICE OF THE CLERK

RECEIVED
SEP 17 1993
OFFICE OF THE CLERK
SUPREME COURT, U.S.

AFFIDAVIT IN SUPPORT OF A MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Bobby Joe Wills being first duly sworn, depose and say that I am the Petitioner in the above- entitled case; that in support of my motion to proceed without being required to repay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes___ No X

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

   b. If the answer is no, state the date of your last employment and the amount of the salary or wages per month which you received.
   Long Shore man Jack Heard Construction $2800 per mo

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other sources? Yes___ No X

   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? Yes___ No X
   If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes___ No X

   a. If the answer is yes, describe the property and state its approximate value. _____

5. List the persons who are depending upon you for support and state your relationship to those persons. NONE

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Is/ Bobby J. Wills

Subscribed and sworn to before me this 8 day of _____ 19___.

CASANDRA VALMOND
NOTARY PUBLIC
STATE OF TEXAS
Commission Expires 10-29-94

Casandra Valmond
Notary

My commission expires 10/29/94

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

BOBBY JOE WILLS,

Petitioner,

V.

THE STATE OF TEXAS

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

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* Counsel of record

QUESTIONS PRESENTED

1. (a) Did the instructions submitted to the jury during the punishment phase of Petitioner's capital murder trial pursuant to TEX. CODE CRIM. PRO. Art. 37.071(b) (Vernon's ed. 1989) prevent jurors from adequately considering Petitioner's mitigating evidence of his mental retardation in violation of the Eighth and Fourteenth Amendments?

(b) Petitioner did not raise this claim in his original direct appeal brief filed with the Texas Court of Criminal Appeals, but instead raised it for the first time in a motion for rehearing in view of Penry v. Lynaugh, 492 U.S. 302 (1989), which was decided after Petitioner filed his brief on direct appeal. That rehearing motion was denied without a written opinion. Does this Court have authority to grant certiorari on this claim under Hathorn v. Lovorn, 457 U.S. 255 (1982), or under 28 U.S.C. § 2106?

2. (a) Is the execution of a mildly mentally retarded juvenile who was convicted and sentenced to death cruel and unusual punishment in violation of the Eighth Amendment?

(b) This claim was not raised in the courts below. Does this Court have authority under 28 U.S.C. § 2106 to remand to the Texas Court of Criminal Procedure for further proceedings on this issue?

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I. As established in Penry v. Lynaugh, 109 S. Ct. 2934 (1989), evidence of mental retardation is constitutionally relevant mitigating evidence that could not be given mitigating effect under the jury instructions submitted at the punishment phase of Petitioner's trial. 15

II. The Court of Criminal Appeals erred in suggesting that Petitioner's evidence of mental retardation was irrelevant for purposes of a Penry claim in view of the fact that such evidence was only introduced during the guilt-innocence phase of Petitioner's capital murder trial, as opposed to during the punishment phase. 18

III. Although this Eighth Amendment Penry claim was not raised at trial and the Texas Court of Criminal Appeals did not originally address the issue on direct appeal, well-established precedent as well as considerations of judicial economy militate in favor of this Court's granting certiorari and, at the very least, remanding this case to the state court to fully consider Petitioner's Penry claim. 20

IV. It is cruel and unusual punishment to execute a mentally retarded capital defendant who was also a juvenile at the time of the crime. 28

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IN THE SUPREME COURT
OF THE UNITED STATES

No. _____

BOBBY JOE WILLS

Petitioner,

-v-

THE STATE OF TEXAS

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

Petitioner, **BOBBY JOE WILLS**, respectfully requests that the Court grant Certiorari, vacate his death sentence, and remand to the Texas Court of Criminal Appeals for further proceedings.

CITATION TO OPINION BELOW

The en banc opinion of the Texas Court of Criminal Appeals is unpublished. A copy of the opinion is attached as **Appendix A**.

JURISDICTION

On May 5, 1993, the Texas Court of Criminal Appeals, in a split decision, affirmed Mr. Wills' conviction and sentence on direct appeal. Mr. Wills filed a motion for rehearing, which was denied on June 16, 1993. A copy of the written order denying Petitioner's motion for rehearing is attached as **Appendix B**. Mr. Wills invokes this Court's jurisdiction pursuant to 28 U.S.C. §§ 1257(3) & 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This issues raised in this petition implicate the Eighth Amendment to the United States Constitution, as incorporated by the Due Process Clause of the Fourteenth Amendment to the United States Constitution, as well as Art. 37.071(b) & (e) of the former Texas capital sentencing statute, Texas Code of Criminal Procedure (Vernon's 1989), the latter of which was amended in 1991, after petitioner's trial. The pertinent parts of these provisions read as follows:

> **Amendment VIII**
> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."
>
> **Amendment XIV**
> ". . . .[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . . "

> **Article 37.071**
>
> (b) On conclusion of the presentation of the evidence, [at the sentencing phase of a capital murder trial] the court shall submit the following three issues to the jury:
>
> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.
>
> . . . .
>
> (e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. . . . .

This case also implicates 28 U.S.C. § 2106, which provides that this Court may remand to the state court for "further proceedings to be had as may be just under the circumstances," even if the reason for the remand relates to a claim not addressed by the state court in the proceedings below. See Eddings v. Oklahoma, 455 U.S. 104, 117 n.* (1982) (O'Connor, J., concurring) (citing 28 U.S.C. § 2106 and Wood v. Georgia, 450 U.S. 261, 265 & n.5 (1981)).

STATEMENT OF THE CASE

A. Facts Relevant to the Questions Presented

Petitioner Bobby Joe Wills, an African American, was

convicted and sentenced to death in state court in Orange County, Texas, for the January 17, 1985 capital murder of Judy Bracewell, a white female. See Wills v. State, unpublished slip op., at 1 (Tex.Crim.App. May 5, 1993). Petitioner was a juvenile (aged seventeen) at the time of the crime; he was eighteen at the time of trial. Statement of Facts (S.F.) vol. XVIII: 627, 631, 633. The only other facts relevant to the issue raised in this petition concern the evidence that Petitioner introduced at his trial regarding his mental retardation.

The issue of Petitioner's mental retardation was first introduced during a pre-trial suppression hearing, in which Petitioner challenged the admission of his confession on the grounds that it was not given knowingly, voluntarily, and intelligently in view of Petitioner's mental and emotional disabilities. During that hearing, which was conducted outside of the presence of the jury, the defense called two expert witnesses who testified about Petitioner's mental retardation. The first witness, Donna Thomasson, was an "educational diagnostician" for the public school system in Orange County, Texas, where Petitioner was attending special education classes and classes for "emotionally disturbed students" at the time that he committed the crime. S.F. vol. II: 36-39. Ms. Thomasson testified that she had contact with Petitioner on numerous occasions during the previous seven or eight years during her employment with the public school system; she specifically testified that she had tested Petitioner's intelligence. Id. Ms. Thomasson stated that when she tested

Petitioner's intelligence using the Wechsler Intelligence Scale in 1983 -- less than two years before the time that Petitioner committed the murder -- Petitioner's "full scale score [i.e., his I.Q.] was sixty-one." Id. at 40. Ms. Thomasson further testified that an I.Q. test administered in three years earlier, in 1980, revealed that Petitioner's I.Q. was then "in the same range as what [it was] in 1983." Id. at 54.

The next expert witness called by the defense was Dr. Curtis Edwin Wills, a licensed psychologist.[1] S.F. vol. II: 57. Dr. Wills testified that he had not only examined the results of intelligence tests given to Petitioner, but also had interviewed Petitioner before trial. Id. at 58-59, 64. Dr. Wills testified that a person, such as Petitioner, who scored 61 on an I.Q. test would qualify as "mentally retarded." Id. at 63, 64. On cross-examination by the prosecutor, Dr. Wills testified that, under prevailing professional standards, Petitioner's I.Q. qualified him as "mildly" mentally retarded. Id. at 71.[2]

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[1] Dr. Wills is unrelated to Petitioner Bobby Joe Wills.

[2] Ms. Thomasson, the public school educational diagnostician whose testimony was discussed supra, testified that Petitioner was "borderline" mentally retarded. See S.F. vol. II: 40. Her classification was *not* based on national professional standards -- as was Dr. Wills' classification -- but instead was based on standards set by Texas state public school officials. As stated in a colloquy between the defense attorney and Ms. Thomasson:

> Q. Did you obtain a standard I.Q. score for Bobby Joe Wills in 1983?
>
> A. Yes, sir.
>
> Q. What was that I.Q. score?

A. The full scale score was sixty-one. . . . [Ms. Thomasson then discussed the three components of a Wechsler I.Q. test -- the "verbal" score, the "performance" score, and the "full scale" score. Petitioner's verbal score was 73; his performance score was 53; and his full scale score was 61.] *In Texas, . . . [w]e look at all three scores to determine a functioning level, and we would say that from these three scores of seventy-three, fifty-four, and sixty-one, we would say that [Bobby Joe Wills] is a borderline retarded student.*

* * *

Q. And the sixty-one, is that simply the average of th[e] [verbal and performance] scores? . . . Is it the mean?

A. Basically, that's comparing the two and coming up with a full-scale score, yes.

Q. What is the total cut-off for what we classify as retarded people?

A. *I think when all three scores [i.e., verbal, performance, and full scale scores] are below the score of seventy, they would say that he is mildly retarded.*

Q. And two out of the three such as we have [in Bobby Joe Wills' case] would mean that he's borderline mentally retarded?

A. Yes. . . .

S.F. vol. II: 41-42 (emphasis added); see also S.F. vol. XVII: 337-38 (repeating that testimony in front of Petitioner's jury). The Texas Court of Criminal Appeals' decision also refers to Mr. Wills' retardation as "borderline." See Wills v. State, slip op., at 2 n.1.

Obviously, Ms. Thomasson's classification of Petitioner as being "borderline" mentally retarded rather than "mildly" mentally retarded -- within the meaning of Texas public school standards -- was in conflict with the prevailing national standard, which presumes "mild" retardation when a person's *full-scale* score is 70 or below. See, e.g., Prejean v. Smith, 889 F.2d 1391, 1402 (5th Cir. 1989) ("full-scale" I.Q. below 70 evinces mental retardation); Rector v. Lockhart, 727 F. Supp. 1285, 1293 (E.D. Ark. 1990) (same); State v. Artis, 384 S.E.2d 470, 488 (N.C. 1989) (same); see also Penry v. Lynaugh, 109 S. Ct. 2934, 2941 n.1 (1989)("To be

Because the trial judge ruled that Petitioner's confession was given voluntarily, knowingly, and intelligently, the defense, in accordance with Texas law,[3] re-introduced *in front of the jury* all of the evidence and arguments introduced during the pre-trial hearing in support of the argument that Petitioner's confession was not given in a constitutionally manner. See generally S.F. vols. XVII-XVIII. Once again, Ms. Thomasson and Dr. Wills testified in essentially an identical manner as they had during the pre-trial hearing. Ms. Thomasson testified that in 1983, two years before the date of the crime, Petitioner was tested to have a full-scale I.Q. of 61 on the Wechsler I.Q. exam. S.F. vol. XVII: 337-38. Dr. Wills extensively explained to Petitioner's jury about the low intellectual capacity of someone, like Petitioner, whose I.Q. was in the mild retardation range.[4] Dr. Wills later testified in front

classified as mentally retarded, a person generally must have an IQ of 70 or below."); see also American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 31-33 (3rd ed.) ["DSM-III"]. It is noteworthy that as of 1992, the American Association on Mental Retardation (AAMR) has revised that presumption to cover persons whose I.Q.s are tested at 75 or below. See AAMR MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 14 (9th ed. 1992).

[3] TEX. CODE CRIM. PRO. Art. 38.22, §§ 6 & 7 (Vernon's 1993).

[4] The following colloquy between defense counsel and Dr. Wills is illustrative:

Q. Doctor, how do we classify a person as mentally retarded? How do psychologists do that?

A. . . . You take a series of tests or evaluations . . . and, generally speaking, we place people in a retarded level who score on a test . . . down toward the lower end of the spectrum of scores. . . .

of the jury that his examination of Petitioner revealed that:

> [Bobby Joe Wills] reads extremely low, his reading ability is very, very low. His math skills are very primitive, very simple. *His orientation to the world is very simplistic. . ., very simplistic in his approach to the way the world operates.*

S.F. vol. XVIII: 390 (emphasis added).[5]

In its attempt to rebut the testimony offered by the defense regarding Petitioner's low intelligence, the State introduced the

---

> * * *
>
> Q. Doctor Wills, is this classification made generally on a person's I.Q. score?
>
> A. Generally speaking, yes.
>
> Q. In the field [of psychology], is there a recognized normal person's I.Q., so to speak?
>
> A. . . . Normal I.Q. being at 100.
>
> Q. In relation to that 100 I.Q., Doctor Wills, a person who, say, possesses a 61 to 71 I.Q., how would you describe the differences in that person's mental processes from a person with a hundred I.Q.?
>
> A. . . . As I mentioned, those people through their simplistic thinking will probably never be able to maintain a checking account, negotiate loans, set up that kind of relationship with society. They're going to function on a moment-by-moment basis. They're going to be very limited in their experimental background. They're going to be very limited in taking their information and applying it to today's life.

S.F. vol. XVIII: 384-87.

[5] In addition to the expert testimony of Dr. Wills and Ms. Thomasson, one other witness testified in front of Petitioner's jury during the guilt-innocence phase about Petitioner's problems. LaQuetta Joy McLellan, a school teacher employed by the Orange County, Texas public schools, testified that she had taught Petitioner during the time that he attended her class for "emotionally disturbed" students. See S.F. vol. XVII: 419-21.

testimony of Dr. Jerome Brown, a Texas psychologist who has repeatedly testified for the State in cases involving mentally retarded capital defendants. S.F. vol XVIII: 439 et seq. See, e.g., Richard v. State, 842 S.W.2d 279, 281 & n.2 (Tex.Crim.App. 1992) (discussing Dr. Brown's claim that a defendant with an I.Q. of 62 was "'slow' but not 'retarded'").[6] Dr. Brown testified that Petitioner's low I.Q. test scores were not reflective of his "native" intelligence, that Petitioner was not mentally retarded, but instead was malingering during an examination conducted by Dr. Brown. S.F. vol. XVIII: 443-474. In later testimony, Dr. Brown opined in front of the jury, after an infamous "hypothetical,"[7] that a person like Petitioner was nothing but a classic "sociopath." S.F. vol. XIX: 633.

During the closing arguments of the guilt-innocence phase, Petitioner's trial counsel discussed at length Petitioner's low intelligence. Counsel argued that because of his low I.Q., Petitioner did not possess a requisite mens rea to have committed capital murder. S.F. vol. XVIII: 485-87 ("He's spent his whole

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[6] Dr. Brown in this manner resembles the infamous Dr. James P. Grigson, whose moniker is "Dr. Death," based on his repeated expert testimony on behalf of the prosecution in Texas death penalty cases. See Satterwhite v. Texas, 486 U.S. 249 (1988); Barefoot v. Estelle, 463 U.S. 880 (1983); Estelle v. Smith, 451 U.S. 454 (1981); see also Ron Rosenbaum, *Travels With Dr. Death* (1991). Dr. Brown also was the State's expert who testified at trial in Penry v. Lynaugh, 109 S. Ct. 2934, 2941 (1989). As this Court repeatedly observed, Johnny Paul Penry's I.Q. was tested over a period of years as being as low as 50; Penry's mental age was that of a 6 1/2 year old. Dr. Brown, however, testified under oath that Penry was "borderline" retarded. Penry, 109 S. Ct. at 2941.

[7] See Barefoot v. Estelle, 463 U.S. 880 (1983).

life in special education. . . . Dr. Wills indicated to you what . . . his I.Q. meant, . . . that he had a very primitive thinking ability, that he could not determine or do any thinking on anything complicated."). With respect to Petitioner's low intelligence, the prosecutor admonished jurors during his closing arguments that they should not "have any sympathy for the defendant because he's a little slow or he's borderline mentally retarded. . . Don't say, 'Poor Old Bobby Joe, he's a little slow, he's borderline mentally retarded. Let's give him a break." S.F. vol. XVIII: 508.

After Petitioner was found guilty of capital murder, further testimony was offered during the punishment phase about Petitioner's low intelligence. Ms. Jacqueline McClintock, a special education counselor employed by the Orange County, Texas public schools, testified that she worked extensively with Petitioner when he attended special education classes in the public schools during his youth. S.F. vol. XIX: 608-611. She testified that Petitioner was emotionally disturbed and had serious educational problems starting from the very first day that he attended Orange County, Texas public schools as a five-year old. Id. at 610. She further testified that Petitioner required extensive educational and behavioral counseling services "probably starting around the fourth or fifth grade." Id. at 611.

During closing arguments at the punishment phase, the prosecutor repeatedly instructed jurors that they were only to

answer the two narrow "special issues" submitted to them.[1] The prosecutor stated:

> You will be tempted to answer questions that you have never been asked and which you cannot find an answer form for on this verdict page. There are only two questions that you're asked. You're not asked "Was the defendant given an unfair chance at life?" . . . You have been specifically instructed to answer two questions. This will be your only responsibility. You are to answer the questions on the basis of the evidence.

S.F. vol. XIX: 667; see also id. at 673 (making same argument). In urging jurors to find that Petitioner was a future danger to society, the prosecution also repeatedly called attention to Petitioner's life history of problems, which, of course, were directly related to his mental disabilities:

> You've heard testimony from people . . . that he was placed in the special [education] programs . . . . You heard testimony from the representatives of the Texas Youth Commission, the case workers, the parole officers, the dormitory supervisor, the teachers who all testified to their efforts. . . . [A] lot of people have tried to help Bobby Joe Wills. Ever since he was in the fourth grade, he's had counseling, he's had behavioral modification classes, he's had group counseling, he's had special education, he was placed in an emotionally disturbed classroom. . . . *But, you know, all the counselors and all the psychologists and all the teachers and all the case workers and all the supervisors can't do anything for Bobby Joe Wills.* They can't rehabilitate Bobby Joe Wills.

S.F. vol. XIX: 668-69, 772.

The trial court instructed Petitioner's jurors at the close of the punishment phase in accordance with the version of TEX. CODE

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[1] See TEX. CODE CRIM. PRO. Art. 37.071(b). The jury instructions submitted to Petitioner's jury at the close of the sentencing phase, which track the language of Art. 37.071(b), are discussed infra.

CRIM. PRO. 37.071(b) (Vernon's 1989) in operation at the time of Petitioner's trial. Petitioner's jury was simply asked to answer two "special issues": (1) "Was the conduct of the defendant, Bobby Joe Wills . . . , that caused the death of the deceased . . . committed deliberately and with the reasonable expectation that the death of the deceased or another would result?"; and (2) "Is their a probability that the defendant Bobby Joe Wills . . . , would criminal commit acts of violence that would constitute a continuing threat to society?" See Transcript, at 323. The jury was not given any definitional instructions regarding any of the operative terms of either of the special issues. See Transcript, at 321-24. The jury was expressly instructed that it should, "in determining each of the Special Issues":

> *consider[] all of the evidence submitted to you in the full trial of the case, that is, all of the evidence submitted to you in the first part of this case wherein you were called to determine the guilt or innocence of the defendant* and all of the evidence admitted before you in the second part of the trial wherein you were called upon to determine the answers to [the] Special Issues hereby submitted to you.

Transcript, at 321 (emphasis added). After deliberating a little over three hours, Petitioner's jury returned affirmative answers to both special issues and, pursuant to Texas law, the trial court automatically sentenced Petitioner to death. See S.F. vol. XXIX: 725-30.

B. How the Issue Was Raised and Decided Below

(i) Petitioner's first "question presented" herein

On Petitioner's direct appeal to the Texas Court of Criminal Appeals, Petitioner's counsel[9] did not raise the Eighth Amendment claim that Petitioner's jury was constitutionally precluded from considering the evidence offered to Petitioner's jury at trial regarding Petitioner's mental retardation. See Wills v. State, unpublished slip op., at 2. Nor did Petitioner raise that claim at trial. However, Petitioner's direct appeal counsel did raise the Penry claim in a timely motion for rehearing, which the Court of Criminal Appeals denied without written opinion. See Appellant's Motion for Rehearing (attached hereto as Appendix C); see also order of Court of Criminal Appeals denying motion for rehearing (attached hereto as Appendix B). As will be discussed infra, under well-established precedent, as well as in the interest of judicial economy, this Court can and should grant certiorari, vacate Petitioner's death sentence, and, at the very minimum, remand to the Texas Court of Criminal Appeals so that the state court may consider Petitioner's claim that his sentence was imposed in violation of the Eighth and Fourteenth Amendments because the jury instructions submitted to Petitioner's jury precluded consideration of Petitioner's mitigating evidence of mental retardation.

(ii) Petitioner's second "question presented" herein

Petitioner concedes that this question was not raised at trial or on direct appeal to the Texas Court of Criminal Appeals.

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[9] Present counsel has since replaced the Petitioner's counsel on direct appeals.

Because Petitioner's claim here is the type that need not have been raised at trial -- since it argues that an entire class of persons should be exempt from the death penalty -- the claim is not amenable to traditional procedural default rules. Furthermore, under 28 U.S.C. § 2106 and this Court's caselaw interpreting that statute, this Court has the authority to grant certiorari since the constitutional error is apparent on the face of the record.

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE GRANTED

Summary of Arguments

This petition presents two important questions regarding the cruel-and-usual-punishment clause of the Eighth Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment. First, Petitioner contends that there was a straight-forward violation of Penry v. Lynaugh, 492 U.S. 302 (1989), at his trial when his jury was instructed to consider all mitigating evidence -- including his mental retardation -- under the Texas statutory "special issues" in effect at the time of Petitioner's 1985 trial. Second, although Petitioner's second claim presented herein was not raised at trial or on direct appeal to the Texas Court of Criminal Appeals, Petitioner asks this Court to remand to the Texas Court of Criminal Appeals for further consideration of whether it is cruel and unusual punishment to execute a mentally retarded juvenile who has been convicted and sentenced to death. Under 28 U.S.C. § 2106 and caselaw interpreting that statute, this Court has authority to remand to the state courts for further

proceedings.

I. As established in Penry v. Lynaugh, 109 S. Ct. 2934 (1989), evidence of mental retardation is constitutionally relevant mitigating evidence that could not be given mitigating effect under the jury instructions submitted at the punishment phase of Petitioner's trial.

As this Court recognized in Penry v. Lynaugh, 109 S. Ct. 2934 (1989), mitigating evidence of mental retardation may not be given proper mitigating effect under the Texas "special issues" submitted to the jury during the punishment phase at Petitioner's trial. See id. at 2948-52.[10] Indeed, as the Penry Court observed, evidence of a Texas capital defendant's mental retardation is a "double-edged sword" in that a rational jury would perversely view such evidence as aggravating rather than mitigating under the pivotal "future dangerousness" special issue. Id. at 2949. And because of the Texas Court of Criminal Appeals' consistent refusal to broadly define the "deliberateness" special issue for jurors -- so as to distinguish it from a Texas capital jury's threshold finding during the guilt-innocence deliberations that a capital murder was committed "intentionally" -- a rational jury could not give evidence of retardation full mitigating effect under the "deliberateness" special issue either. See id. at 2948-49.[11]

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[10] The instructions submitted at Petitioner's trial and at Penry's trial were virtually identical; jurors were simply asked to answer the first two "special issues" in TEX. CODE CRIM. PRO. Art. 37.071(b) (Vernon's 1989).

[11] In keeping with established Texas practice, see, e.g., James v. State, 772 S.W.2d 82, 102 (Tex.Crim.App. 1989), King v. State, 553 S.W.2d 105, 107 (Tex.Crim.App. 1977), Petitioner's trial judge

In the instant case, the prosecutor's arguments that jurors should only answer the narrow special issues and not dispense mercy in view of evidence that had no mitigating relationship to the special issues[12] further increased the likelihood that Petitioner's jury believed that it was unable to give mitigating effect to Petitioner's evidence of mental retardation. See also S.F. vol. XVIII: 508 (prosecutor's argument that jury should not "give [Petitioner] a break" because of his mental retardation). Likewise, the prosecutor's arguments that Petitioner's condition could not be cured only underscored the "double-edged" nature of Petitioner's mental retardation under the "future dangerousness" special issue. As the prosecutor argued during the punishment phase:

> [A] lot of people have tried to help Bobby Joe Wills. Ever since the fourth grade he's had group counseling, he's had special education, he was placed in an emotionally disturbed classroom. But, you know, all the counselors and all the psychologists and all the teachers and all the case workers . . . can't do anything for Bobby Joe Wills. They's can't rehabilitate Bobby Joe Wills.

S.F. vol. XIX: 668-69, 772

Thus, just as in Penry, Petitioner's evidence of retardation in the instant case could not be given proper mitigating effect.[13]

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did not define the term "deliberately" for Petitioner's jury. See Transcript at 320-23 (punishment instructions).

[12] See S.F. vol. XIX: 667, 673, quoted in the Statement of the Case, supra.

[13] Johnny Paul Penry's degree of retardation and Petitioner's degree of retardation are virtually identical. Penry's I.Q. was tested between 50-63 and he had the mental age of a 6 1/2 year old. See Penry, 109 S. Ct. at 2941. Petitioner's I.Q. was tested at 61

Indeed, even more so than in Penry, Petitioner's mental retardation was particularly mitigating in that Petitioner was also only a juvenile at the time of the crime. See Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982) ("[W]hen the defendant was sixteen years old at the time of the offense, there can be no doubt that evidence of . . . a severe emotional disturbance is particularly relevant" mitigating evidence.); Woods v. Florida, 479 U.S. 954, 954-55 (1986) (Marshall & Brennan, JJ., dissenting from denial of certiorari) (the mitigating significance of a capital defendant's youth is "particularly compelling where, as here, the offender's mental capacities are organically impaired"). In sum, Petitioner's death sentence was imposed in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

-- which, according to Ms. Thomasson, was consistent with prior I.Q. testing -- and his mental abilities were considered by Dr. Wills to be "very simplistic." See "Facts Relevant to the Questions Presented," supra.

The Court of Criminal Appeals' characterization of Petitioner's mental retardation as "borderline" was in error, see Wills v. State, slip op., at 2 n.1, as it reflected only one witness' characterization of Petitioner's intelligence. In Penry, one expert witness also characterized Johnny Paul Penry's mental retardation as "borderline." See Penry, 109 S. Ct. at 2941. More importantly, as discussed in supra note 2, in the instant case, the witness who referred to Petitioner's retardation as "borderline," Ms. Thomasson, used the term "borderline" in reference to *Texas educational standards*, as opposed to the nationally recognized professional standards regarding I.Q. testing which this Court adopted in Penry. See Penry, 109 S. Ct. at 2941 n.1. As discussed in the "Facts Relevant to Question Presented," supra, another witness -- Dr. Wills, a licensed psychologist -- stated that Petitioner's 61 I.Q. rendered him "mildly" mentally retarded and referred to Petitioner's mental processes as "very simplistic."

II. The Court of Criminal Appeals erred in suggesting that Petitioner's evidence of mental retardation was irrelevant for purposes of a Penry claim in view of the fact that such evidence was only introduced during the guilt-innocence phase of Petitioner's capital murder trial, as opposed to during the punishment phase.

In its opinion on Petitioner's direct appeal, the Court of Criminal Appeals suggested that no Penry violation occurred because Petitioner's evidence of mental retardation was introduced only in relation to Petitioner's claim that his confession was not obtained knowingly, intelligently, and voluntarily. See Wills v. State, unpublished slip op., at 2 n.1. The Texas court's suggestion here was erroneous, conflicts with numerous other decisions by the Court of Criminal Appeals, ignores the explicit jury instructions submitted to Petitioner's jury, and thus should not prevent this Court from granting relief on Petitioner's Penry claim.

As the Texas Court of Criminal Appeals has repeatedly recognized, any evidence presented to jurors during the guilt-innocence phase of a capital murder trial may also be considered by the same jury during the punishment phase.[14] See, e.g., Richard v. State, 842 S.W.2d 279, 281 & n.2 (Tex.Crim.App. 1992); Ex Parte Ellis, 810 S.W.2d 208, 211 (Tex.Crim.App. 1991). Indeed, in another passage of the Texas court's decision in this very case, the Court of Criminal Appeals reaffirmed this holding. See Wills v. State, unpublished slip op., at 31 (citing Cannon v. State, 691 S.W.2d 664 (Tex.Crim.App. 1985), and Green v. State, 682 S.W.2d

[14] In Texas capital cases, the same jury that hears evidence during the guilt-innocence phase also hears evidence during the punishment phase.

271, 287-288 (Tex.Crim.App. 1984)). In Richard v. State, supra, the Texas court was presented with a situation identical to the instant case -- that is, a Penry claim based on evidence of mental retardation that was only introduced during the guilt-innocence phase in connection with a claim that a confession was not given voluntarily, knowingly, and intelligently. As the Texas court stated:

> Dr. Brown [the same psychologist who testified for the State in Petitioner's case and in Penry] . . . testified at [the] guilt-innocence phase pursuant to appellant's strategy to persuade the jury that a statement he gave to police was not knowing and voluntary due to appellant's inability to comprehend statutory and constitutional warnings. *This circumstance does not detract from the mitigating significance of Dr. Brown's testimony as it relates to the punishment phase. "Whether evidence has 'mitigating value' is not determined by the party who offers it, the time of admission, or its manner of admission . . . into evidence during trial. The question is merely whether this evidence was before the jury for its consideration."* [citation omitted].

Richard, 842 S.W.2d at 281 n.2 (emphasis added).[15]

In this regard, it should be noted that Petitioner's jury was specifically instructed during the sentencing phase that they should consider all of the evidence offered during the guilt-innocence phase in deciding the "special issues" during the punishment phase. See Transcript at 321.

[15] In Granviel v. Texas, 113 S. Ct. 3027 (1993), and Hawkins v. Texas, 113 S. Ct. 3029 (1993), the mitigating evidence of mental disabilities suffered by the Texas capital defendants in those two cases likewise was only introduced during the guilt-innocence phases of their respective trials. Nevertheless, this Court remanded to the Texas Court of Criminal Appeals for reconsideration of the court's rejection of the two defendants' Penry claims.

III. Although this Eighth Amendment Penry claim was not raised at trial and the Texas Court of Criminal Appeals did not originally address the issue on direct appeal, well-established precedent as well as considerations of judicial economy militate in favor of this Court's granting certiorari and, at the very least, remanding this case to the state court to fully consider Petitioner's Penry claim.

A. Under well-established Texas law, Petitioner's failure to raise this claim at trial is no bar to it being raised on appeal for the first time.

As a threshold matter, it should be recognized that the Texas Court of Criminal Appeals has repeatedly held that an Eighth Amendment Penry claim that was not raised at trial in a case that went to trial before this Court's 1989 decision in Penry v. Lynaugh, 109 S. Ct. 2934 (1989), is not procedurally defaulted and may be raised for the first time on appeal. See Black v. State, 816 S.W.2d 350, 367-74 (Tex.Crim.App. 1991) (opinion of Campbell, J., concurring, joined by five judges); Selvage v. Collins, 816 S.W.2d 390, 392 (Tex.Crim.App. 1991) (on certified question from the U.S. Court of Appeals for the Fifth Circuit). Petitioner's 1985 trial occurred long before Penry. Thus, the only issue for this Court regarding whether Petitioner's Eighth Amendment claim is properly before this Court is whether Petitioner's failure to raise the issue in his original brief on direct appeal to the Texas Court of Criminal Appeals prevents this Court from exercising jurisdiction.

B. The Texas Court of Criminal Appeals rendered a final judgment for purposes of 28 U.S.C. § 1257.

28 U.S.C. § 1257 provides that a "final judgment" of a state

court may be reviewed by this Court. It is thus well established that "*ordinarily*, this Court does not decide questions not raised or involved in the lower court." Youakim v. Miller, 425 U.S. 231, 234 (1976) (emphasis added); see generally Stern, Gressman & Shapiro, SUPREME COURT PRACTICE, § 6.26, at p.364 (6th ed. 1986). In a similar vein, this Court has repeatedly held that "[r]aising [a] federal question for the first time in a petition for rehearing in the highest state court is generally insufficient unless the court actually entertains the petition and expressly decides the question." Stern, Gressman & Shapiro, *Supreme Court Practice*, § 3.21(c), at p.155 (citing cases).

In the instant case, Petitioner admittedly did not originally raise the Penry claim on direct appeal to the Court of Criminal Appeals.[16] Petitioner failed to do so because it was only *after* his appellate brief had been filed that this Court rendered its decision in Penry. Thus, Petitioner's direct appeal counsel raised the Penry claim for the first time in a timely motion for rehearing filed after the Court of Criminal Appeals had rendered its original

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[16] It is perhaps arguable, however, that the Court of Criminal Appeals, in an advisory opinion, did in fact address the Penry claim, which it raised *sua sponte*, in footnote #1 of the court's opinion. See Wills v. State, slip op., at p.2 n.1 ("Appellant has not raised a point of error under Penry . . . . He offered the testimony only at trial to show that he did not understand his rights prior to giving his confession, not to mitigate his punishment."). The second sentence here seems to suggest that the court believed that a Penry claim in the instant case would have had no merit, even assuming that Petitioner had raised the claim on direct appeal.

decision on direct appeal. See Appendix C.[17] The Texas court denied that motion without written opinion.

Although Petitioner admittedly raised the Penry claim for the first time in a motion for rehearing and the court apparently did not "actually entertain[] the petition and expressly decide the question," see SUPREME COURT PRACTICE, supra, at p.364, the Court of Criminal Appeals' denial of Petitioner's motion for rehearing motion should nevertheless be treated as a "final judgment" on the Penry claim for two separate reasons.

(i) This Court has authority to reach the Penry claim under 28 U.S.C. § 2106, Eddings v. Oklahoma, and Wood v. Georgia.

This Court has repeatedly granted certiorari in cases in which a particular issue was not properly raised on direct appeal in the courts below so long as the error is on the face of the record. See, e.g., Eddings v. Oklahoma, 455 U.S. 104, 113-14 & n.9 (1982); id. at 117 & n.* (O'Connor, J., concurring); Wood v. Georgia, 450 U.S. 261, 265 & n.5 (1981). Eddings is particularly on point in the present case: in Eddings, this Court remanded a capital case to

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[17] As Petitioner stated in that motion:

> At the time that Appellant's case was tried and at the time Brief for Appellant was filed, the case of Penry had not yet been decided. Given the fact that Penry became law after Appellant's case was tried and briefed, attorneys for Appellant did not have the opportunity initially to raise the Penry [claim]. However, now the Penry case is law, this Court should reconsider the application of Penry to the instant case.

Appellant's Motion for Rehearing, at 1.

the state courts for resentencing as a result of an Eighth Amendment violation regarding mitigating evidence -- an issue raised for the first time in this Court. As Justice O'Connor stated in her concurring opinion in Eddings:

> Despite the Chief Justice's argument that we may not consider the Lockett issue because it was never fairly presented to the Court below, there is precedent for this Court to consider the merits of the issue. [citing Wood]. . . . *Because the trial court's failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of Lockett, it is our duty to remand this case for resentencing.*

Eddings, 455 U.S. at 117 n.* (emphasis added). As was noted in both Eddings and Wood, a congressional statute provides this Court with authority to grant certiorari in this case and, at the very minimum, remand to the Texas Court of Criminal Appeals for full consideration of Petitioner's Eighth Amendment claim even though it was neither originally raised by Petitioner's prior counsel on direct appeal nor decided by the state court in its original decision. See 28 U.S.C. § 2106 (authorizing Court to "require [upon remand] such further proceedings to be had as may be just under the circumstances"). In the instant case, the Penry claim is apparent on the face of the record and, thus, this Court has the authority to remand to the state court under § 2106.

It should be further recognized that this is not a case in which the Texas Court of Criminal Appeals did not have any opportunity to address the Eighth Amendment claim that Petitioner is now raising. The Texas court expressly recognized Penry in its

opinion on direct appeal, yet implicitly (and erroneously)[11] suggested that there was not an Eighth Amendment violation in Petitioner's case because the evidence of Petitioner's retardation was not offered during the punishment phase, as opposed to the guilt-innocence phase. Furthermore, the court refused to grant relief on the Penry claim that was raised in Petitioner's timely motion for rehearing.

(ii) Because the Court of Criminal Appeals has inconsistently disposed of litigants' motions for rehearing raising issues for the first time, this Court, under Hathorn v. Lovorn, has authority to reach the Penry issue.

The most important reason why this Court has authority to reach Petitioner's Penry claim is this Court's holding in Hathorn v. Lovorn, 457 U.S. 255, 262-63 (1982), in which the petitioner raised a federal claim for the first time in a motion for rehearing in state court, which was summarily denied without a written opinion, just as in the instant case. Despite the general rule that this Court will not address claims raised for the first time in a state court motion for rehearing that was summarily denied, see, e.g., Youakim v. Miller, 425 U.S. 231, 234 (1976), this Court in Hathorn nevertheless reached the federal claim because the state court had inconsistently treated litigants' requests that the court address an issue raised for the first time in a motion for

[11] As discussed above, the Texas court erred here, because it is a well-established practice in Texas capital cases that a capital sentencing jury should consider all of the evidence offered during the guilt-innocence phase in deciding the punishment issues.

rehearing. As this Court held:

> State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims. Even if we construe the Mississippi Supreme Court's denial of petitioner's petition [for rehearing] as the silent application of a procedural default bar, we cannot conclude that the state court consistently relies upon this rule. Respondents cite two cases indicating that the Mississippi Supreme Court will consider an issue raised for the first time in a petition for rehearing "[o]nly in exceptional cases." [citations omitted]. Although these opinions may summarize the court's practice prior to 1969, we have been unable to find any more recent decisions repeating or applying the rule. . . . *[T]he court does not consistently preclude consideration of issues raised for the first time in the petitions.*

Hathorn, 457 U.S. at 263 (emphasis added). Thus, this Court granted certiorari and reached the merits of the claim.

Petitioner's case is squarely in point with Hathorn. In the Texas Court of Criminal Appeals' jurisprudence, there are numerous cases -- including recent cases -- where the court has fully addressed the merits of a claim raised by one of the parties for the first time in a motion for rehearing. See, e.g., Johnson v. State, No. 69,750, unpublished slip op., 1992 WESTLAW 235396 (Tex.Crim.App. May 27, 1992) (denying appellant's motion for rehearing), aff'd, Johnson v. Texas, ___ U.S. ___, 61 U.S.L.W. 4738, 1993 WESTLAW 218283 (U.S. June 24, 1993); Boyle v. State, 820 S.W.2d 122 (Tex.Crim.App. 1991) (on State's motion for rehearing); Wilson v. State, 692 S.W.2d 661 (Tex.Crim.App. 1984) (on State's motion for rehearing); cf. Rochelle v. State, 791 S.W.2d 121 (Tex.Crim.App. 1990). Johnson v. State is particularly relevant because in that case a capital defendant raised a Penry claim for

the first time in a motion for rehearing, which the Texas Court of Criminal Appeals addressed in a written opinion, thus permitting the defendant to appeal to this Court on the Penry claim. See Johnson v. Texas, 61 U.S.L.W. 4738.

Therefore, as in Hathorn, this Court in the instant case should grant certiorari because of the Texas Court of Criminal Appeals's inconsistent treatment of motions for rehearing raising an issue for the first time.

C. At the very minimum, this Court should grant certiorari on Petitioner's Eighth Amendment claim, vacate Petitioner's death sentence, and remand for further consideration by the Texas Court of Criminal Appeals.

This Court should at the very minimum grant certiorari, vacate Petitioner's death sentence, and remand for further consideration of Petitioner's Penry claim by the Texas Court of Criminal Appeals, as the state court has not fully addressed the merits of Petitioner's Penry claim, save perhaps in an implicit and cursory manner in a footnote. Such a remand would be in keeping with this Court's well-established practice of permitting lower courts to address claims in the first instance. See, e.g., Alexander v. United States, 113 S. Ct. 2766, 2776 (1993) ("We think it preferable that this question be addressed by the Court of Appeals in the first instance.").

A remand for further consideration would be particularly appropriate in view of the fact that Petitioner's case was disposed of by the Court of Criminal Appeals before this Court's decision in

Johnson v. Texas, 61 U.S.L.W. 4738, 1993 WESTLAW 218283 (U.S. June 24, 1993), in which this Court reaffirmed Penry's holding with respect to evidence of mental retardation.[19] It is especially noteworthy in this regard that this Court remanded numerous other Texas capital cases involving evidence of mental disabilities and raising Penry claims -- which were decided by the Texas court before Johnson -- for further consideration by the Texas Court of Criminal Appeals in view of Johnson. See Lucas v. Texas, 113 S. Ct. 3029 (June 28, 1993); Hawkins v. Texas, 113 S. Ct. 3029 (June 28, 1993); Earhart v. Texas, 113 S. Ct. 3026 (June 28, 1993); Granviel v. Texas, 113 S. Ct. 3027 (June 28, 1993).

A remand so that the Texas court may fully consider Petitioner's Penry claim is also in the interest of judicial economy. In numerous post-Penry cases, the Texas court has consistently granted relief on Penry grounds to capital defendants who have offered evidence of mental retardation at their trials. See, e.g., Rios v. State, 1992 Tex.Crim.App. LEXIS 148 (1992); Ex Parte Williams, 833 S.W.2d 150 (Tex.Crim.App. 1992); Richard v. State, 842 S.W.2d 279 (Tex.Crim.App. 1992); Ex Parte McGee, 817 S.W.2d 77 (Tex.Crim.App. 1991). As discussed at length supra, there was extensive expert testimony in front of Petitioner's jury that Petitioner's full-scale I.Q. was 61 on the Wechsler scale, a score which was said to be consistent with previous testing. Dr. Wills testified that Petitioner was retarded and referred to his

[19] The Court of Criminal Appeals denied Petitioner's motion for rehearing on June 16, 1993; Johnson was handed down by this Court on June 24, 1993.

mental processes as "very simplistic." Petitioner respectfully, yet candidly, submits that this Court's refusal to grant certiorari and vacate his sentence would only force him to waste judicial resources by filing a habeas petition in state trial court as a first step to obtaining ultimate relief, which will undoubtedly be obtained at some point. A remand to the Court of Criminal Appeals for further consideration of the Penry claim on direct appeal will only serve everyone's interests.

Accordingly, this Court should grant certiorari, vacate Petitioner's death sentence, and remand for a new trial. Alternatively, this Court should, at the very minimum, vacate Petitioner's death sentence and remand for further consideration of the Penry claim by the Texas Court of Criminal Appeals.

IV. It is cruel and unusual punishment to execute a mentally retarded capital defendant who was also a juvenile at the time of the crime.

A. Petitioner's failure to raise this issue at trial or on direct appeal is not a bar preventing this Court from granting certiorari and remanding to the Court of Criminal Appeals for consideration of this claim.

The fact that this claim was not raised at trial is not a procedural bar that would prevent this Court from addressing the claim. A claim that a certain class of persons are constitutionally exempt from execution is, by its very nature, not one subject to traditional procedural default rules requiring a defendant to raise the claim at trial in order to raise it in later proceedings. Cf. Ford v. Wainwright, 477 U.S. 399 (1986).

Alternatively, this claim was not "reasonably available" to counsel in early 1985, the time of Petitioner's trial and, thus, is a "right not recognized" that would not have required a contemporaneous objection at Petitioner's 1985 trial in order to preserve it for appeal. See Reed v. Ross, 468 U.S. 1 (1984).[20] Assuming *arguendo* that *this* Court does not consider Petitioner's claim here to have been a "right not recognized" within the meaning of Reed, the Court should nevertheless remand the case to the Texas court for it to consider whether under the Texas "right-not-recognized" doctrine this claim would have required a contemporaneous objection to be preserved for appeal. See, e.g.,

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[20] Petitioner's research of all state and federal cases reveals that, before the time of Petitioner's trial in early 1985, only a small handful of published capital murder decisions existed in which courts had discussed whether the execution of juveniles constituted cruel and unusual punishment. See, e.g., Cannaday v. State, 455 So.2d 713 (Miss. 1984). This Court left the question open in Eddings v. Oklahoma, 450 U.S. 1040 (1982), and only addressed the issue in cases long after Petitioner's trial. See Stanford v. Kentucky, 109 S. Ct. 2969 (1989); Thompson v. Oklahoma, 108 S. Ct. 2687 (1988). Similarly, Petitioner's research of all state and federal cases reveals that, before the time of Petitioner's 1985 trial, there were even fewer cases raising claims that the execution of a mentally retarded person violates the Eighth Amendment. See Brogdon v. Butler, 824 F.2d 338, 341 (5th Cir. 1987) (in referring to habeas petitioner's claim that execution of retarded defendant cruel and unusual, court noted that "[p]etitioner cites no authority for his contention, *and we can find none*."). The first case in which a member of this Court discussed this particular claim was Smith v. Francis, 474 U.S. 925, 925-29 (October 25, 1985) (Marshall, J., dissenting from denial of certiorari), which was decided after Petitioner's trial. Of course, Penry -- in which the full Court addressed the issue -- was not decided until 1989. The only two published opinions discussing the specific issue of whether it is cruel and unusual to execute a convicted capital defendant who is *both* mentally retarded *and* juvenile occurred *after* Petitioner's trial. See Woods v. Florida, 479 U.S. 954, 954-55 (1986) (Marshall & Brennan, JJ., dissenting from denial of certiorari); Prejean v. Smith, 889 F.2d 1391, 1401-02 (5th Cir. 1989), cert. denied, 494 F.2d 1090 (1990).

Black v. State, 816 S.W.2d 350, 367-74 (Tex.Crim.App. 1991) (opinion of Campbell, J., joined by five judges) (discussing the Texas "right not recognized" doctrine).

B. The failure to Petitioner to raise this claim on direct appeal would not be a bar to this Court's decision to remand to the Texas Court of Criminal Appeals.

As discussed in relation to Petitioner's Penry claim, supra, this Court possesses authority under 28 U.S.C. § 2106 to grant certiorari, vacate Petitioner's death sentence, and remand to the Texas Court of Criminal Appeals for consideration of a claim neither raised on direct appeal nor addressed by the state court if the alleged error is apparent on the face of the record and such a remand would be "just under the circumstances." In view of the serious nature of this claim -- regarding the constitutionality of executing a mentally retarded juvenile -- certainly a remand to the Texas court for consideration of this claim would advance the cause of justice.

C. This claim is an important one that this Court left open in its respective 1989 decisions in Stanford v. Kentucky and Penry v. Lynaugh; because it is worthy of being addressed by this Court, a remand to the Texas courts is thus appropriate as the first step towards this Court's ultimate resolution of this important question.

In two separate 1989 cases, this Court decided that: (i) the execution of a convicted capital defendant who was sixteen or seventeen years old at the time of the crime is not cruel and

unusual punishment under the Eighth Amendment;[21] and (ii) the execution of a mildly mentally retarded convicted capital defendant is not cruel and unusual punishment under the Eighth Amendment.[22] The obvious question left open is whether the execution of a convicted capital defendant who was mildly retarded *and* a juvenile (aged seventeen) at the time of the crime constitutes cruel and unusual punishment. Because Thompson v. Oklahoma, 108 S. Ct. 2687 (1988) (plurality) (execution of convicted capital defendant who was fifteen years old at time of the crime is cruel and unusual punishment), suggests that Stanford demarcated the limit about how far that this Court would go in permitting states to execute persons traditionally considered to lack the mental and moral capacity to be punished for committing crimes subject to capital punishment, this issue presented in the instant case is a particularly appropriate one for remand for consideration by the Texas court. Youth alone may not be enough; but youth and some other factor just may be. Cf. Eddings v. Oklahoma, 455 U.S. at 115-16 ("[W]hen the [capital] defendant was sixteen years old at the time of the offense, there can be no doubt that evidence . . . of severe emotional disturbance is particularly relevant.").

Finally, Petitioner observes that a remand of this of claim to the Texas Court of Criminal Appeals would be particularly appropriate if this Court also chooses to remand Petitioner's Penry claim based on his mitigating evidence of mental retardation to the

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[21] See Stanford v. Kentucky, 109 S. Ct. 2969 (1989).

[22] Penry v. Lynaugh, 109 S. Ct. 2934, 2952-58 (1989).

state court. This would only serve to conserve judicial resources in view of the fact that Petitioner will be compelled to raise this particular claim in post-conviction habeas corpus proceedings if there is no remand of this claim by this Court to the Texas court to decide on direct appeal -- even if he ultimately secures relief on the Eighth Amendment mitigation claim.[23]

[23] Relief on the Eighth Amendment mitigation claim would not obviate the need for Petitioner to challenge the State's right to seek the death penalty against Petitioner under any and all circumstances in view of Petitioner's age and retardation at the time of the crime -- in that relief on the Eighth Amendment mitigation claim would permit the State to retry Petitioner and seek a death sentence under constitutional sentencing instructions.

V. Conclusion

For the foregoing reasons, Petitioner respectfully requests that this Court grant certiorari. Although Petitioner requests that this Court itself address the merits of his first question presented, Petitioner alternatively requests, at the very minimum, a remand to the Texas Court of Criminal Appeals for further consideration of the Penry claim. Furthermore, irrespective of this Court's disposition of his first question presented, Petitioner requests a remand to the Texas Court of Criminal Appeals for consideration of Petitioner's second question presented herein.

Respectfully submitted,

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VOL I OF V

No. _____ CCRA No. 69,495

AA // 11-19-86

BOBBY JOE WILLS aka. ROBERT JAMES WILLS *Appellant*

CAPITAL MURDER DEATH

ORANGE *County.*

_____ MOTION FOR REHEARING IS _____ _____.

_____ 19 ____.

_____ JUDGE

Trial Court 260TH
Trial Court No. D-850134
Trial Judge BUDDIE J. HAHN
Disposition AFF
Date 5-5-93
Justice _____ P.C. ____ S ____
Panel ____ Quarter ____ En Banc ____
S/F IN - VOLS I-III
St. B 9-15-86

Appellant's MOTION FOR REHEARING IS Denied.
16 June 19 93.
JUDGE

69,495

IN THE TEXAS COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

FILED IN
COURT OF CRIMINAL APPEALS
MAY 24 1993
Thomas Lowe, Clerk

BOBBY JOE WILLS	§	
VS.	§	NO. 69,495
THE STATE OF TEXAS	§	

APPELLANT'S MOTION FOR REHEARING

TO THE HONORABLE JUSTICES OF THE TEXAS COURT OF CRIMINAL APPEALS:

COMES NOW, BOBBY JOE WILLS, Appellant in the above-entitled and -numbered cause, and submits this Motion for Rehearing pursuant to Rule 230 of the Texas Rules of Appellate Procedure and requests that the Court reconsider its opinion of May 5, 1993, and reverse and remand this cause for new trial.

POINT OF ERROR

The Court erred in affirming the death penalty of Appellant in light of the Penry issue.

ARGUMENT

At the time Appellant's case was tried and at the time Brief for Appellant was filed, the case of Penry had not yet been decided. Given the fact that Penry became the law after Appellant's case was tried and was briefed, attorneys for Appellant did not have the opportunity initially to raise the Penry case. However, now that the Penry case is law, this Court should consider the application of Penry to the instant case. The instant case contains the specific issues raised by Penry and based on the Penry case the instant case should be reversed and remanded for new trial.

PRAYER FOR RELIEF

For the reasons herein alleged, Appellant prays the Court grant this Motion for Rehearing, set aside the opinion of May 5, 1993, and reverse the Judgment and Sentence in Cause No. 69,495.

Respectfully submitted,

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BOBBY JOE WILLS,
a/k/a ROBERT JAMES WILLS, Appellant

NO. 69,495 Vs. Appeal from ORANGE County

THE STATE OF TEXAS, Appellee

OPINION

After a trial by jury in Orange County, appellant was convicted of capital murder. TEX.PENAL CODE ANN., § 19.03(a)(2). During punishment, the jury returned affirmative findings to the statutory special issues in TEX.CODE CRIM.PROC.ANN., Art. 37.071 (b)(1) & (2). The trial court sentenced appellant to death. He is now before this Court on direct appeal of his conviction and sentence. Appellant brought seventeen points of error to this Court in his appeal.

On January 17, 1985, appellant went into a Get-N-Go store in Orange County, and demanded money from Judy Bracewell, the victim, who was running the store at the time. After the victim had handed the money over to appellant, he directed her into a storage room. Once there, while she pleaded for her life, appellant shot her four times in the face and upper chest. Mrs. Bracewell died from her wounds.

In his first point of error, appellant complains that the trial court erred in allowing testimony regarding matters obtained through an illegal search of his cell prior to trial. Jail Captain Brad Bacom testified that he had observed bibles, magazines and what he believed was a junior high-school literature book in appellant's cell. Appellant claims that Bacom's testimony was not admissible since Bacom discovered the reading material during an unconstitutional search. Appellant cites no authority for this contention.

Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984), controls the disposition of this point of error. In that case, Chief Justice Burger, speaking for a majority of the United States Supreme Court, held that "the Fourth Amendment proscription against unreasonable searches does not apply within the confines of

the prison cell." Id. Accordingly, the jail captain's information regarding the contents of the cell cannot be said to have been obtained in violation of the United States Constitution. Appellant's first point of error is without merit, and it is overruled.

In his second point of error, appellant claims that the district court erred in not suppressing appellant's confession since it was taken in violation of the Fifth and Sixth Amendments to the U.S. Constitution. Appellant claims that the State failed to meet its burden to prove that he had knowingly and intelligently waived his constitutional rights. And, he claims that based upon a totality of the circumstances the confession should not have been admitted.

Appellant particularly argues that he did not understand his rights as read to him. At trial, he called witnesses who testified that he is borderline mentally retarded and that his reading comprehension, as tested two years prior to this incident, was only "second grade eighth month".[1] He points to the testimony of Detective Broussard, the officer who took his statement, who acknowledged a suspicion that appellant's I.Q. was below average. And finally, in his brief to this Court, appellant alleges that he was intimidated by Constable Jack Thompson who was present just before appellant's statement was typed.

However, there is evidence in the record indicating that appellant had his warnings orally recited to him twice before his statement was ever taken. There is also evidence indicating that both times he had his rights recited to him, he stated that he understood them, and that he never told anyone that he did not understand his rights. His allegation of intimidation was raised

[1] Appellant has not raised a point of error under Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). He offered the testimony at trial only to show that he did not understand his rights prior to giving his confession, not to mitigate his punishment.

for the first time on this appeal and, there is evidence in the record that appellant actually exhibited an arrogant and hostile attitude toward the Constable who, allegedly, intimidated him. Finally, although Detective Broussard acknowledged his suspicion of appellant's below average I.Q., he testified that he personally felt that appellant understood his rights.

Considering all of the circumstances we first note that while a below average mentality is a factor to be considered in determining whether a defendant has intelligently and knowingly waived his rights, it is not conclusive of the issue. Bizzarri v. State 492 S.W.2d 944, at 945-946 (Tex.Cr.App. 1973); Bell v. State, 582 S.W.2d 800, at 808-809 (Tex.Cr.App. 1979), cert.den. 453 U.S. 913, 101 S.Ct. 3145, 69 L.Ed.2d 995 (1981); and Smith v. State, 779 S.W.2d 417, n.8 at 429 (Tex.Cr.App. 1989). Additionally, in a hearing to determine the admissibility of a defendant's confession, the trial judge is the fact finder and he alone determines the weight and credibility of the witnesses testimony. Kelly v. State 621 S.W.2d 176, 179 (Tex.Cr.App. 1981). Since the trial judge in this case determined that the confession was admissible based upon sufficient evidence before him to support the conclusion, his decision to admit the confession was not clearly erroneous and will not be disturbed. Bell v. State, supra; and Smith v. State, supra. Appellant's second point of error is overruled.

In his third point of error, appellant complains that the trial court erred in granting exemptions to members of the venire unauthorized by the Code of Criminal Procedure. Appellant claims that while the TEX.CODE CRIM.PROC. ANN., Art. 35.16 lists the reasons for which a juror can be challenged for cause in a criminal case, the code does not provide for juror exemptions. He argues that while the trial court allowed six jurors to claim an exemption found at V.T.C.A., Government Code § 62.106(2),[2] the exemptions

[2] Formerly Vernon's Ann. Civ. St. Art. 2135.

listed in § 62.106 do not apply in criminal cases. However, his argument is erroneous.

The only thing we can imagine that might have led appellant to arrive at this erroneous conclusion is that the predecessor statute to V.T.C.A., Government Code § 62.106 was VERNON'S ANN. CIV. ST., Art. 2135. Apparently appellant believed that since the predecessor to § 62.106 was found in the civil statutes, it had no applicability to criminal trials. Nevertheless, appellant is mistaken. (emphasis added).

The text of V.T.C.A., Government Code § 62.106(2) sets out in pertinent part:

> "A person qualified to serve as a petit juror may establish an exemption from jury service if he... (2) has legal custody of a child or children younger that 10 years of age and his service on the jury requires leaving the child or children without adequate supervision..."

We cannot find, anywhere within the statute, a qualification that would limit its application to civil trials. What is more, these exemptions have been utilized many times in criminal cases. See e.g., Johnson v. State, 548 S.W.2d 700 (Tex.Cr.App. 1977). For these reasons, appellant's third point of error is overruled.

In his fourth point of error, appellant presents a multifarious argument. First he claims that it was error for the trial court to permit the court administrator to excuse jurors. And second, he claims that because people with children under 10 were allowed to take an exemption, he was deprived of his right to be judged by a jury composed of a fair and representative cross section of the community.

Regarding his first claim, appellant's alleges that the court administrator impermissibly exercised some discretionary authority regarding the exemption of venirepersons when only the judge should have the authority to grant such exemptions. He directs our attention to an excerpt from the record where his counsel

questioned the administrator regarding the practice:

> Q: Whenever you get those legal exemptions, you do not either pass that by a judge or call either the District Attorney, or the defense counsel involved in these cases. You exempt them for legal exemptions. Is that correct?
>
> A: Right....

It appears that appellant has confused the requirements of TEX.CODE CRIM.PROC.ANN., Art. 35.03 relating to juror excuses, with those of TEX.CODE CRIM.PROC.ANN. Art. 35.04 relating to juror exemptions. Art. 35.03 requires the court to "... hear and determine excuses offered for not serving as a juror,...." while, Art. 35.04 allows for "[A]ny person summoned as a juror who is exempt by law from jury service..." to "...establish his exemption without appearing in person...." Art. 35.04 controls the disposition of this point of error since the jurors were claiming statutory exemptions, and not being excused pursuant to Art. 35.03. In the instant case, the court administrator did not excuse jurors. Art. 35.04 contains no requirement that the judge actually review the exemptions. She merely gave effect to certain claims of exemption which are provided by law. See TEX.GOVT.CODE Ann. § 62.106. Appellant's argument that the trial court erred in permitting the court administrator to excuse jurors is not supported either by the record or by statute.

Further, appellant failed to timely object to the alleged error. TEX.CODE CRIM.PROC.ANN art. 35.06 provides that:

> "The court shall hear and determine a challenge to the array before interrogating those summoned as to their qualifications."

After the jury panel was seated, the court first noted that appellant had an opportunity to view the panel and then asked him if he wished to file any motions. Counsel for appellant then responded that there was "...no objection..." and no wish to "file any motion to shuffle or change the order in which they are presently seated." The court then went on to generally instruct the panel and to interrogate them regarding their qualifications.

Appellant did not raise this objection until after the panel had been interrogated by the court. The trial court overruled appellant's objection on the ground that it was not timely made. We agree with the trial court's assessment. Appellant has not preserved this issue for our review. Jackson v. State, 745 S.W.2d 4, 18 (Tex.Cr.App. 1988) cert. denied 108 S.Ct. 2916; Esquivel v. State, 595 S.W.2d 516, 523 (Tex.Cr.App. 1980) cert. denied 101 S.Ct. 408. In addition, by failing to object, appellant waived his claim that the Art. 36.04 exemptions denied him a fair cross-section of the community. For all of the above reasons, point of error number four is overruled.

In his fifth point of error, appellant complains that it was error for the trial court to have excused venireman number 40, Stanley E. Sampson, Sr. Appellant argues that the trial court erred in excusing him because although he was "personally was against the death penalty," he could "nevertheless follow the law." He calls our attention to particular testimony from Mr. Sampson where Mr. Sampson responded to questions as follows:

Q: You said you would be truthful.

A: I would be truthful....

Q: But you would be truthful in answering the questions?

A: I would not lie.

Q: And would you take the oath if the Judge told you had to do it?

A: If I had to. Just like I had to stay another year in the Navy.

However, whenever we determine whether a trial court's ruling on a challenge for cause was error, we look at the voir dire as a whole. Barrow v. State, 688 S.W.2d 860, 863 at n. 1 (Tex.Cr.App. 1985). Therefore, we cannot rest our decision upon just a few excerpts which the appellant would have us rely on. We must also consider the fact that the venireman said he could not truthfully answer the punishment questions. For example, in response to

questions from the prosecution and near the end of his testimony, Mr. Sampson said:

A: I'll tell you, I cannot truthfully answer those questions. Is that what you want? I don't know.

Q: It's not what I want, it's what you can do.

A: I can't. I'm trying to tell you that I can't.

Mr. Sampson demonstrated by his answers to the parties and to the court that he was not merely "reluctant" but rather, he was "hostile". As a result, we conclude that he was, at a minimum, "biased or prejudiced against a phase of the law upon which the state was entitled to rely...for punishment." See TEX.CODE CRIM. PROC.ANN. Art. 35.16 (b)(3). We believe that the venireman's bias and posture can be summed up in his last two answers to questions from the court.

THE COURT: I understand. You would require a higher burden of proof than what the law requires. Is that right?

THE VENIREMAN: Uh-huh.

THE COURT: Your beliefs about the death penalty you feel would prevent or impair your ability to be a fair juror in this case?

THE VENIREMAN: I would be hostile.

Sampson's answers indicated that he would have held the State to a more stringent standard of proof than that of reasonable doubt. We do not believe that the court abused its discretion in its excusal of Mr. Sampson. Little v. State, 758 S.W.2d 551, at 555 (Tex.Cr. App.1988); cert. denied 488 U.S.934 (1988); Jacobs v. State, 787 S.W.2d 397, at 403-404 (Tex.Cr.App.1990); cert.denied 111 S.Ct.231 (1990).

The trial court has discretion to determine whether a venireman is biased or prejudiced and its determination will only be disturbed on appeal when, after viewing the voir dire as a whole, it can be said that its determination was wrong as a matter of law. See also Farris v. State, 819 S.W.2d 490, at 501 (Tex.Cr. App.1990). Appellate courts must consider voir dire evidence in a

light most favorable to the trial court's ruling and defer to it's findings and conclusions where supported by the record. Great deference is to be given to the decision of the trial court who has broad discretion in ruling on a challenge for cause, because the trial court is in a unique position to observe the venireperson's credibility, including the demeanor and tenor of voice of the venireperson. Cooks v. State, No.70,772 (Tex.Cr.App. September 16,1992); Farris v.State, 819 S.W.2d, at 501; Fearance v. State, 771 S.W.2d 486, at 501-502 (Tex.Cr.App.1988); and Ex Parte Russell, 720 S.W.2d 477 (Tex.Cr.App.1986). The trial judge is the one best able to make these determinations. Pyles v. State, 755 S.W.2d 98, 106 (Tex.Cr.App. 1988).

Read in a light most favorable to the trial court's rulings, the evidence in the record supports the findings and conclusions of the court regarding venireman Sampson's bias against the law. Little v. State, 758 S.W.2d, at 555; and Jacobs v. State, 787 S.W.2d, at 403-404. Therefore, appellant's fifth point of error is overruled.

In his sixth point of error, appellant argues that "[T]he trial court erred in overruling appellant's challenge for cause of a juror who had formed an opinion of appellant." Appellant first calls our attention to juror Johnny B. Johnson whom appellant attempted to challenge for cause. The trial court overruled the challenge and Mr. Johnson served on the jury. However, even if the trial court had erred, appellant waived his right to complain.

Appellant, on two separate occasions after the attempted challenge for cause, accepted Mr. Johnson as a juror in the case. Additionally, even though appellant could have exercised one of it's peremptory strikes against Mr. Johnson, he did not do so. We have said that an appellant can not complain about a trial court's failure to discharge an objectionable juror unless, as a direct result, he is forced to accept a juror who is objectionable.

Easterling v. State, 710 S.W.2d 569 (Tex.Cr.App. 1986) cert. denied 107 S.Ct. 1509; Chappell v. State 519 S.W.2d 453, 457 (Tex.Cr.App. 1975). Additionally we have said that in order to preserve the right to complain of a trial court's failure to excuse a juror when that juror is challenged for cause, a defendant must exercise a peremptory strike against the objectionable juror if he has one available.

When the trial court overruled appellant's challenge of Mr. Johnson for cause, appellant still had peremptory strikes available to him. He chose not to use them. If this venireman was objectionable to appellant and appellant had peremptory strikes available to him he had to exercise a peremptory strike to preserve error. Thus, if there was error it was not preserved for review.

Peculiarly, appellant also advances a complaint regarding another juror, for an entirely different reason, under this same point of error. Appellant argues that venireman number 46, Mr. Willard Simmons, should not have been excused for cause. He claims that "[T]he trial court abused its discretion in excusing Willard Simmons based on his knowledge of the defendant without certainty such knowledge would affect his verdict." Nevertheless, when the challenge for cause was granted by the trial judge, appellant did not object. An appellant cannot complain for the first time on appeal that the trial court erred in granting the state's challenge to a venireman for cause if the appellant failed to object at trial. Bass v. State 622 S.W.2d 101 (Tex.Cr.App.1981); cert. denied, 456 U.S. 965 (1982). For that reason and for the reasons stated above regarding juror Johnson, the appellant's sixth point of error is overruled.

In point of error seven, appellant complains that the trial court erred by excusing venireman Jerrel Rhines in violation of TEX.CODE CRIM.PROC. Art. 35.16(a)(10). Appellant asserts that the "real consideration" for a trial court, in making a determination

as to a venireman's qualifications to serve on a jury, is whether the juror is "incapable or unfit to serve on the jury." Appellant then presents the argument that Mr. Rhines was neither incapable nor unfit, and, consequently, it was error to excuse him from jury service. However, once again we believe appellant is mistaken.

TEX.CODE CRIM.PROC. Art. 35.16(a) states in pertinent part: "a challenge for cause is an objection made to a particular juror, alleging some fact which renders him incapable or unfit to serve on the jury." Thus, we do not dispute appellant's assertion that the "real consideration" in a determination of such a challenge is whether the juror is "incapable or unfit to serve."

However, Article 35.16(a) (10) also indicates that: "[I]f the court, in it's discretion, is not satisfied that he (the juror) is impartial, the juror shall be discharged."(emphasis added). It is apparent that the statute gives the trial court discretion to make a determination regarding the impartiality of a prospective juror and whether he or she is qualified to serve. We will not disturb that determination absent a showing of a clear abuse of discretion. Jacobs v. State, 787 S.W.2d 397, 402 (Tex.Cr.App. 1990) cert. denied, 111 S.Ct. 231; Williams v. State, 773 S.W.2d 525, 536 (Tex.Cr.App. 1988), cert. denied, 110 S.Ct. 257.

In the instant case, the record shows that Mr. Rhines could not be impartial. He told the trial judge that he believed the appellant was guilty. It was established that Rhines had reached a conclusion as to appellant's guilt or innocence. See Harris v. State, 784 S.W.2d 5, at 25-26 (Tex.Cr.App. 1989), cert.denied, 494 U.S. 1052 (1990). And, finally, even in the course of attempting to argue that Rhines had not reached a conclusion as to appellant's guilt or innocence, he conceded in his brief to this Court that Mr. Rhines vacillated in his answers.

As we stated earlier in our discussion of appellant's fifth point of error, the trial court has discretion to determine whether

a venireman is biased or prejudiced and its determination will only be disturbed on appeal when, after viewing the voir dire as a whole, it can be said that its determination was wrong as a matter of law. See also Farris v. State, 819 S.W.2d, at 501. Appellate courts must consider voir dire evidence in a light most favorable to the trial court's ruling and defer to it's findings and conclusions where supported by the record. Great deference is to be given to the decision of the trial court who has broad discretion in ruling on a challenge for cause, because the trial court is present to observe the venireperson, including the demeanor and tenor of voice of the venireperson. Cooks v. State, supra; Farris v. State, supra; Fearance v. State, 771 S.W.2d, at 501-502; and Ex Parte Russell, 720 S.W.2d 477. The trial judge is the one best able to make these determinations. Pyles v. State, 755 S.W.2d, at 106.

Read in a light most favorable to the trial court's rulings, the evidence in the record supports the findings and conclusions of the court regarding venireman Rhines. We do not believe that the court abused its discretion in its excusal of Rhines. Harris v. State, 784 S.W.2d, at 25-26. Therefore, appellant's seventh point of error is overruled.

In appellant's eighth point of error, he complained that TEX. CODE CRIM.PROC.ANN. Art. 35.16 is unconstitutional. Because Art. 35.16 allows a party to challenge a juror for cause whose opinions, biases, or prejudices favor the State, appellant argued that "it violates his right to a fair and impartial jury made up of a cross-section of the community." This issue arose from the State's successful challenge of Rhines, discussed above in the seventh point of error. We find appellant's argument to be without merit.

This Court has held that a trial court abuses its discretion when it fails to excuse a juror who is disqualified as a matter of law because he has a bias or prejudice against the law under

TEX.CODE CRIM.PROC.ANN. Art. 35.16. Clark v. State, 717 S.W.2d 910, at 917 (Tex.Cr.App. 1986); and Little v. State, 758 S.W.2d, at 556. Trial courts must comply with these provisions of Art. 35.16 in order to insure that a panel is composed of jurors who can be fair and impartial. A juror who has a bias against the law, as a matter of law, can not be fair and impartial. In Clark, id., the entire voir dire of venireperson Thornton did not establish that, as a matter of law, she was a "biased-against-the-law-juror." In Little, id., the same conclusion was reached as to venireperson Welch. A different result would have been reached in those cases if the entire records of voir dire had shown that Thornton and Welch were "biased-against-the-law" jurors.

Here, appellant based his argument on the fact that Rhines was challenged because he was shown to be biased against appellant for already reaching a conclusion as to the guilt of appellant. See TEX.CODE CRIM.PROC.ANN. Art. 35.16 (a)(9)&(10). We will not rule that a defendant's right to have a jury which represents a fair cross-section of the community includes the right to have jurors sit who have been shown to have already reached a conclusion that the defendant is guilty. Such jurors could not fairly and impartially decide the case before them. A fair cross-section of the community does not include citizens whose opinions, biases, or prejudices prevent them from fairly and impartially deciding a case.

Within this point of error, appellant also argued that the State possessed an ulterior motive for proving that Rhines had reached a conclusion as to the guilt or innocence of appellant in order to challenge him for cause. Appellant explained that it was because both Rhines and appellant were African-American. We note that this is not a Batson v. Kentucky, 476 U.S.79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), argument, because the State did not exercise a peremptory challenge against Rhines, and because appellant has

TEX. CODE CRIM.PROC.ANN. Article 35.16(a) states in pertinent part:

> "[A] challenge for cause is an objection made to a particular juror, alleging some fact which renders him incapable or unit to serve on the jury." (emphasis added)

In the instant case, having reviewed the record as a whole, we are convinced that the State complied fully with Article 35.16(a).

As appellant notes in his brief to this Court that, at the end of the State's examination of Mr. Weatherspoon on voir dire, the prosecutor simply said: "[C]ause, Your Honor." Appellant's counsel questioned the venireman next, and the trial court asked a few questions as well. Then, prior to ruling on the State's challenge for cause, the court asked if the State had anything further, and the prosecutor responded:

> "[O]f course, I believe he did say that his knowledge of the background of the defendant might influence his verdict, either on punishment or guilt-innocence. [A]t least that was my understanding."

In light of this explanation of the State's reason for requesting a challenge, we find the State's challenge for cause was sufficient with respect to Article 35.16(a). Even though we are not convinced that the court would have been without authority to grant the State's motion for cause without it, the State did allege facts which would have rendered Mr. Weatherspoon incapable or unfit to serve on the jury.

Further, appellant did not object to the exclusion of Mr. Weatherspoon at trial and as a result he has not preserved this error for our review. Consequently, for this reason and for the reasons discussed above, appellant's ninth point of error is overruled.

In his tenth point of error, appellant complained that the trial court erred in failing to grant his challenge for cause of venireman Robert W. Lafleur. He argued that his challenge of Mr. Lafleur should have been granted because the venireman was biased

not accused the State of using its peremptory challenges to keep African-Americans off the jury. At trial, appellant did not argue that the State requested a challenge for cause because Rhines was African-American. Appellant has not shown, either at trial or on appeal, that African-Americans were systematically excluded from his jury. Because it was shown that Rhines was properly excused because he had already decided that appellant was guilty, and because appellant made no attempt to show, or bring it to the attention of the trial court, that the State challenged Rhines because he and appellant were both members of the same minority group, we find appellant has failed to establish that the successful challenge of Rhines denied him a trial by a jury composed of a fair cross-section of the community. Appellant's eighth point of error is overruled.

In his ninth point of error, appellant complains that the trial court erred in excusing venireman number 48, Travis Weatherspoon, when no effective challenge for cause was pending. Alleging the prosecutor simply said "[C]ause, your honor," he admits in his brief to this Court that the State challenged the venireman, however, appellant claims that the challenge did not comply fully with the requirements of TEX.CODE CRIM.EROC,ANN., Art. 35.16. Appellant alleges that the state moved to disqualify the venireman for "cause", but failed to "allege some fact which renders him incapable or unfit to serve on the jury." Consequently, he argues that the court should have overruled the objection.

Appellant called attention to our opinion in the case of Garcia v. State, 626 S.W.2d 46 (Tex.Cr.App. 1982), wherein we sustained a trial court's overruling of a defendant's challenge for cause because "the accused does not show in what manner the juror was objectionable to him, nor that the juror was unfair or impartial." Garcia, at 55. However, we find the instant case to be distinguishable from Garcia on the facts.

against two areas of the law upon which appellant was entitled to rely, namely: (1) the full possible range of punishment and (2) the burden of proof at the punishment stage of trial.

Appellant called our attention to testimony from Mr. Lafleur wherein he answered questions regarding his thinking on the subject of the available range of punishment for murder. He directed us to the following excerpt from the record:

"Q: Are you tell me, then, that if you can -- could you or couldn't you think of any set of facts where you could do that , give five years probation in a murder case?

A: I can't think of any that I could core up with in my own mind.

Q: Even the fact situation that Mr. Jenkins explained to you?

A: About the man pulling the plug?

Q: Right.

A: Could I consider probation in that instance?

Q: Five years' probation. I mean, what we're talking about is the minimum. There's a whole range up to ten years, anyway, of probation, but the question is the minimum, five years?

A: Well, I would say no... . I do not know that I could consider five years' probation for a murder."

Additionally, appellant called our attention to testimony from Mr. Lafleur wherein he answered questions regarding his thinking on the subject of the burden of proof in the punishment phase of the trial. Regarding that subject he directed us to the following testimony:

"Q: The obvious question is if you're on a jury and you hear a capital murder case and you have found that person guilty beyond a reasonable doubt of taking another person's life intentionally, wouldn't that require, then, that your answers to those two questions be yes?

A: Yes.

Q: And that's based upon the strong belief that the death penalty is the proper punishment for someone who intentionally, commits murder and the law provides that the death penalty is the punishment?

A: Yes, I believe that."

Nevertheless, as we have stated before, whenever we determine whether a trial court's ruling on a challenge for cause was error, we look at the voir dire as a whole. Barrow v. State, 688 S.W.2d, n.1, at 863. Consequently, we can not rest our decision on just a few excerpts which the appellant would have us rely upon.

As we stated earlier in this opinion, a trial court has discretion to determine whether a venireman is biased or prejudiced and its determination will only be disturbed on appeal when, after viewing the voir dire as a whole, it can be said that its determination was wrong as a matter of law. See also Farris v. State, 819 S.W.2d, at 501. Appellate courts must consider voir dire evidence in a light most favorable to the trial court's ruling and defer to the court's findings and conclusions where they are supported by the record. Great deference is to be given to the decision of the trial court who has broad discretion in ruling on a challenge for cause, because the trial court is in a unique position to observe the venireperson's credibility, including the demeanor and tenor of voice of the venireperson. Cooks v. State, supra; Farris v. State, Id.; Fearance v. State, 771 S.W.2d, at 501-502; and Ex Parte Russell, 720 S.W.2d 477. The trial judge is the one best able to make these determinations. Pyles v. State, 755 S.W.2d, at 106.

With that in mind we have reviewed the record in a light most favorable to the trial court's ruling and found other answers given by Lafleur in response to questions asked of him on voir dire by the Court. We will set out both the answers which he gave to questions regarding his thinking on the subject of the range of punishment in a murder case as well as the answers which he gave to questions regarding his thinking on the subject of the burden of proof at the punishment stage of trial.

The following is an excerpt from the record on voir dire where Mr. Lafleur answered questions on the range of punishment for

murder:

Q: Let me give you a hypothetical. Let's say husband and wife are married for twenty-five or thirty years, are deeply in love, devoted to one another. She is terminally ill, dying of cancer, and she's hooked up to a respirator and she's in constant pain and torment and the husband intentionally pulls the plug that causes her death and let's say he's convicted of murder. In a proper - - and I'm not trying to limit you necessarily to that particular fact situation but in a proper case, could you consider, at least consider, as little as five years probation in a murder case?

A: Based on the word consider, yes. I can consider it.

* * *

THE COURT: With regard to the minimum punishment, you stated that you could consider giving probation in a murder case, five years probation.

THE VENIREMAN: I could consider it, yes.

THE COURT: In the proper case, you could consider it. Is that what you're saying?

THE VENIREMAN: Right. I would have to, wouldn't I?

THE COURT: No, that's not what I'm telling you. It's difficult to envision all of the possible fact situations that might possibly exist whereby a person is convicted of murder and the question is, could you consider the full range of punishment and in the proper case - - and I'm not trying to tell you what that may be in your mind but could you consider five years probation and could you, in fact, in the proper case give five years probation?

THE VENIREMAN: Yes. In the proper case, yes.

When asked the following questions on the burden of proof at the punishment stage of trial, Lafleur answered:

THE COURT: But you understand the State has the burden of proof on those two questions and that burden of proof never shifts. They've got to prove to you those two questions should be answered yes. Do you understand? So in a proper case, could you find a person guilty of capital murder and yet answer those questions no depending upon the facts of the case?

THE VENIREMAN: Based upon what you just said, yes, I could do that.

THE COURT: Would you expect a defendant in a proper case like that to bring forth any evidence or would you keep the burden on the State?

THE VENIREMAN: At that point, I would think that would need it.

THE COURT: Do you understand that he's not required to bring any evidence forward at any point in the trial, not required to testify, either at guilt-innocence or punishment phase, and the fact that he doesn't cannot be considered as any evidence to you in answering those questions yes. The State has the burden of convincing you through their evidence that the answer should be yes.

THE VENIREMAN: Based on what you just said, I would be relying on what evidence was brought up by the State to make my decision on both parts.

THE COURT: And the fact that the defendant did not present any evidence, you wouldn't consider that as any evidence that you should answer that question yes?

THE VENIREMAN: No.

Having reviewed the record as a whole, we do not find that the trial court erred as a matter of law. The entire record of the voir dire of LaFleur shows that he could consider the complete range of punishment, including the minimum for the offense of murder, and that he would not hold the State to a lesser burden of proof at punishment than that required by law. As pointed out above, the trial court witnesses the demeanor of the potential jurors and is the one best able to make these determinations. Farris v. State, 819 S.W.2d, at 501; and Pyles v. State, 755 S.W.2d, at 106. Having found support for the trial court's decision in the record of the voir dire of LaFleur, we overrule appellant's tenth point of error.

In his eleventh point of error, appellant argued the trial court erred in questioning individual jurors outside the scope of TEX.CODE CRIM.PROC.ANN. Art. 35.17. According to appellant, Art. 35.17(2) limits the role of the trial court in how it may propound to jurors the principles of law in a capital murder case. Here, appellant stated the trial court exceeded its authority when it began to question venireperson Cecil Gossett after appellant had questioned him. At this point, appellant felt that Gossett was challengeable for cause because he was predisposed to assess a death penalty sentence unless appellant could prove why Gossett should answer "no" to the special issues. It is appellant's view that a trial court's role in voir dire ends after it has propounded

the general principles of law, and that it is up to either the State or a defendant to attempt to rehabilitate a venireperson. The trial court erred, according to appellant, in exceeding the scope of Art. 35.17(2) and ultimately forcing him to exercise a peremptory strike on a venireperson who was subject to a challenge for cause.

During the voir dire of Gossett, appellant asked him about his belief in the death penalty, and whether it would preclude him from giving a life sentence as a "proper punishment" for capital murder. Gossett answered, "No, it wouldn't. I could consider life in prison for it and not necessarily consider the death penalty or death over that." However, Gossett then told appellant, "Like I say, just because you find them guilty, that they ought to just automatically get the death penalty. Not if I could see in there getting life." Gossett felt there was room for both punishments. Appellant argued that these answers proved Gossett was overly willing to assess a death sentence if appellant was found guilty.

Gossett also answered questions on the burden of proof at punishment. In response to appellant's question whether Gossett would expect appellant to have the burden to prove why he should get life, Gossett said, "Well, I think it would help." Gossett answered affirmatively when appellant asked him whether it should be the defense's burden "to present evidence to show you why you should answer the questions no." Appellant then challenged Gossett for cause.

Before ruling, the trial court asked Gossett a few questions. Gossett answered affirmatively when the trial court asked him if he knew the State had the burden of proof to establish both that appellant was guilty and that the answers to the special issues should be "yes." Gossett also said that "yes, sir," he understood that appellant did not have the burden of proof at either phase of the trial, and that the answers to the special issues were presumed

"to be no until the State convinces you otherwise." The trial court continued to question Gossett about his understanding of the burden of proof: that appellant had no burden to come forward with any evidence, and that if he did not, the presumption would still be that the answers to the special issues were "no." Gossett assured the trial court that he understood. Gossettt was then turned back over to the State and appellant for further questioning.

Appellant again asked Gossett if he still expected a defendant "to come forward with the evidence to prove to you or convince you to answer the questions no." Gossett told appellant, "It would help, I think, in my opinion." Appellant renewed his challenge for cause. The trial court then asked Gossett some more questions, "just to be clear" in his own mind what were Gossett's impressions of the law.

Gossett assured the trial court that he understood that the State had the burden to prove that the answers to the special issues were "yes," that appellant had no burden to come forward with any evidence or to testify, that he could not answer the issues "yes" until the State proved to him that he should, and that he could base his answers to the issues solely on the evidence before him and not on the fact that appellant brought no evidence forward at punishment. The trial court overruled appellant's motion for cause.

Appellant objected to the trial court's decision and to the trial court's method "to rehabilitate the witnesses." Appellant stated that the trial court acted outside its role in the trial and was not "simply instructing the people as to the law but (was) telling them and leading them to other correct answers." The trial court overruled appellant, explaining:

> "The Court is attempting to question the witnesses where the court feels the witnesses are confused and have not properly understood the questions posed either by the State or by the defense."

Appellant then exercised a peremptory strike against Gossett.

First, appellant argued that the trial court's actions in asking questions of Gossett prior to ruling on appellant's challenge for cause exceeded the scope of Art. 35.17(2). The statute sets out:

> "In a capital felony case, the court shall propound to the entire panel of prospective jurors questions concerning the principles, as applicable to the case on trial, of reasonable doubt, burden of proof, return of indictment by grand jury, presumption of innocence, and opinion. Then, on demand of the State or defendant, either is entitled to examine each juror on voir dire individually and apart from the entire panel, and may further question the juror on the principles propounded by the court."

In the instant trial, the trial court questioned each prospective juror concerning the principles mentioned in the statute. The court would then turn the prospective juror over to the parties for further voir dire.

Appellant cited no authority to support his argument that Art. 35.17(2) did not allow the trial court to question Gossett further prior to ruling on appellant's challenge for cause. Prior cases from this court interpreted Art. 35.17(2) contrary to appellant's position. In Gardner v. State, 753 S.W.2d 195 (Tex.Cr.App. 1987), we decided that

> "the statute does not prohibit additional questioning by the trial judge and we do not infer such a prohibition. In countless cases before this Court, we have seen the trial judges intervene in voir dire examinations. Usually such intervention is warranted for purposes of clarification and expedition and we have implicitly approved this practice time and time again."

Gardner v. State, at 210. See, also, Beets v. State, 767 S.W.2d 711, at 744-745 (Tex.Cr.App. 1987)(wherein this Court found the questions of the "trial court were worded in such a manner as to expose, not conceal, animus or bias on the part of the prospective jurors.")

As in Gardner and Beets, we find in the instant case that the

questioning of Gossett by the trial court was proper in scope and content, and was in accordance with Art. 35.17(2). We do not find that the trial court's questioning of Gossett was reasonably calculated to benefit the State or prejudice appellant. Gardner v. State, supra. The questioning was intended solely to clear up the trial court's confusion over Gossett's answers to questions the trial court perceived Gossett had trouble understanding. As such, the trial court's actiones were "warranted for purposes of clarification and expedition." Gardner v. State, supra.

Second, appellant implicitly argued, here, that the trial court should not have overruled his challenge for cause. We find the trial court correctly held that Gossett was not excusable for cause. Viewing the voir dire of Gossett as a whole, the trial court did not err, as a matter of law, when it determined that Gossett was not biased or prejudiced in his view of the law. Viewing the evidence in a light most favorable to the trial court's decision, we find the record supports the trial court's conclusion that Gossett understood the State had the burden of proof at punishment, that appellant had no burden to come forward with evidence to prove he should receive a life sentence, and that the presumption on the special issues was that they should be answered "no" unless the State could prove to Gossett they should be answered "yes." Bird v. State, 692 S.W.2d 65; and Pyles v. State, 755 S.W.2d, at 106. Appellant's eleventh point of error is overruled.

In point of error twelve, appellant urged this court to hold the "trial court erred in failing to grant defendant's challenge for cause against a juror who could not consider the full punishment range for capital murder." Appellant contended that Kevin Miller could not consider the full range of punishment in the instant case, specifically, Miller could not consider life imprisonment as an option to imposition of the death penalty. Appellant stated in his brief that it was his "heartfelt belief

that this (sic) responses disqualified Mr. Miller as a matter of law.(emphasis added by appellant)" The state responded in its brief that Miller's answers throughout the entire voir dire showed that he "would truly base his punishment verdict on the evidence, and not automatically vote "yes" on the special issues to insure a death sentence."

During voir dire, appellant asked Miller if his belief in the death penalty could be summarized in the phrase "an eye for an eye, tooth for a tooth type thing?" Miller responded, "Yes, sir." Appellant then asked Miller if "any type of murder in your mind deserves the death penalty?" Miller answered, "With the exception of wartime, something like that." When appellant asked Miller if there would be "no evidence you could ever consider that would persuade you to vote no to those questions, once you had found him guilty," Miller said, "Right." However strong were Miller's opinions about the death penalty, he also indicated on voir dire that he understood the presumptions during the penalty stage of the trial and the State's burden to overcome those presumptions.

Miller told the trial court that, "yes," he could answer the special issues in accordance with the evidence, including a "no" answer if he was not convinced beyond a reasonable doubt. Miller indicated to the State that he understood that the two stages of the trial were separate and distinct, and that he should not automatically find one way or the other based solely on what happened at the guilt determination stage of the trial.

After appellant challenged Miller for cause, Miller told the State that he would hold the State to its burden of proving to him that the answers to the special issues should be yes. Miller also said that he understood appellant never had the burden of proving the answers should be "no." Miller assured the court that he would answer the special issues "in accordance with the evidence," and not answer them just "to insure the death penalty for someone."

After viewing the voir dire of Miller as a whole and considering the evidence in a light most favorable to the trial court's ruling, we believe the trial court's determination to overrule appellant's challenge for cause was not erroneous. Farris v. State, 819 S.W.2d, at 501. The record supports the trial court's decision to not grant appellant's challenge for cause. Even though Miller indicated his support for the death penalty, he also demonstrated that he would answer the special issues in accordance with the evidence presented to him, and in light of the State's burden to prove to him that the answers should be "yes." Cordova v. State, 733 S.W.2d 175, at 184 (Tex.Cr. App. 1987); and Cockrum v. State, 758 S.W.2d 577, at 592 (Tex.Cr. App. 1988). Deferring to the decision of the trial court, we do not find that he abused his discretion when he did not grant appellant' challenge for cause. Pyles v. State, 755 S.W.2d, at 106. Appellant's twelfth point of error is overruled.

In appellant's thirteenth point of error, he stated that "the trial court erred in refusing to submit the third special issue, provocation, to the jury at the punishment phase." in this point of error, appellant presents two separate arguments.

First, appellant contended in his brief that TEX.CODE CRIM. PROC.ANN. Art. 37.071(b) required the trial court to submit the third special issue regardless of whether the evidence at trial raised the issue of provocation by the deceased. Appellant relied upon the wording of Art. 37.071(b):

> "On conclusion of the presentation of the evidence, the court shall submit the following three issues to the jury: ..."

Appellant argued that "in light of the mandatory "shall'" the qualifying phrase does not give the Trial Court discretion" in what issues to submit to the jury. We note that appellant cited no authority in support of this argument in his brief.

We find the trial court was not mandatorily required to submit

the third special issue to the jury. The language of Art. 37.071 (b)(3) indicates that the third special issue shall only be submitted to a jury if the issue of provocation is raised at trial. Art. 37.071(b)(3) states, after the language set out above,:

> " ... if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased."

This section contrasts with the language in Art. 37.071(b)(1) & (2), which do not contain the preamble, "if raised by the evidence." The first two special issues shall always be submitted to a jury in a capital murder trial. The third shall be submitted to the jury only if it is raised by the evidence. We find this first argument from appellant to be without merit.

Second, appellant contended that the evidence at trial raised the issue of provocation by the deceased. In his confession, which was admitted into evidence, appellant stated:

> " ... When I went into the store I was wearing blue pants with a T-shirt. The gun was tucked into my pants and my T-shirt was hiding it. When I went into the store I was alone and there was no other customers in the store. I then showed the gun to the lady, I just raised my shirt and showed her the gun. I told her to give me the money. She then put the money in a paper bag. She then handed me the money and I told her to step into the storage room on the side of the counter. This was when I pulled the gun from my pants. I then pointed the gun at the lady, she then said please don't shoot me. I then told her I wasn't going to shoot her. I guess she got paranoid or something because she then hit my hands to push the gun away and the gun went off. I just got the money and got the hell out of there. ..."

Appellant pointed to his statement that the deceased "hit my hands to push the gun away and the gun went off" as the evidence which raised the issue of provocation by the deceased.

We disagree with appellant's evaluation of the evidence. The evidence which he pointed to in his brief may have raised the issue of an accidental shooting of the deceased, but it did not raise the issue of a provocative act by the deceased. According to appellant,

the deceased's intent was only to push the gun away from pointing at her and not to attack appellant.

"In order to raise the issue of provocation, it is necessary that there be evidence of the deceased's conduct just prior to her death; also, that evidence must be sufficient to be considered provocation." Hernandez v. State, 643 S.W.2d 397, at 401 (Tex.Cr. App. 1982); and Marquez v. State, 725 S.W.2d 217, at 224 (Tex.Cr. App.1987). In the instant case there was evidence of the deceased's conduct prior to her death, but, as pointed out above, there "were no sufficiently provocative acts by the deceased to raise the issue." Lucas v. State, 791 S.W.2d 35, at 65 (Tex.Cr.App. 1989) (wherein the deceased fought the defendant, "grabbing the steering wheel and attempting to escape his grasp."). The actions of the deceased in the instant case were defensive in an attempt to thwart her murder, but were not provocative. "A robbery victim has a right to defend himself without such defense rising to the level of "provocation." Nichols v. State, 754 S.W.2d 185, at 204 (Tex.Cr. App. 1988). Appellant's thirteenth point of error is overruled.

In appellant's fourteenth point of error, he argued the trial court erred in allowing an expert to testify about opinions beyond the scope of his experience. At trial, the State called Dr. Oscar Griffin, the pathologist for Orange County, to testify. Appellant complains on appeal that two of Dr. Griffin's opinions, his opinion that one of the victim's wounds was "a very close wound" and his opinion about the path that two of the bullets took through the victim's body, exceeded his qualifications and expertise. We disagree.

Appellant failed to preserve both of these arguments for appeal. At trial, appellant objected only to Griffin's opinion regarding the bullet paths. When Griffin began to discuss the entry point of one of the bullets, appellant objected that, "I'm not sure that Dr. Griffin is qualified to testify as to the path of the

bullets." Later in his testimony, Griffin talked about the entrance point of the second bullet. Appellant requested, "May I have a running objection on this testimony, the path of the bullets?" The trial court granted this request.

Appellant's argument against the admissibility of Griffin's expert opinion testimony on appeal is restricted to the extent of his objection at trial. In Hodge v. State, 631 S.W.2d 754, at 757 (Tex.Cr.App. 1982), this Court held that the defendant did not properly preserve his argument on appeal for review because the "objection made at trial was not the same (as his) assertion on appeal." A defendant's point of error on appeal "must correspond with the objection made at trial." Turner v. State, 805 S.W.2d 423, at 431 (Tex.Cr.App. 1991). We will restrict our analysis to appellant's complaint regarding Dr. Griffin's qualifications to testify on the path of the bullets.

To testify as an expert witness, a person must have "such skill, knowledge, or experience, that it [is] probable his opinion would be of assistance to the jury." Sanne v. State, 609 S.W.2d 762, at 774 (Tex.Cr.App. 1980). "So long as a person has been qualified as an expert in this field and is expressing an opinion based upon his professional expertise," the expert opinion testimony should not be excluded. Mays v. State, 563 S.W.2d 260, at 263 (Tex.Cr.App. 1978).

At trial Dr. Griffin explained that he had a medical degree in pathology and was board certified in that field. Griffin had performed thousands of autopsies, and is a specialist in determining the cause of death. Griffin testified that he had been taught to determine the path of bullets in a body by the use of medical probes and physical observations. In the instant case, Dr. Griffin stated that "without question" he was positive in his professional opinion "that he was able to physically trace these bullets down." On cross-examination, Dr. Griffin emphasized that

the only part of his opinion that was speculation concerned what happened to the path of one of the bullets when it entered the wrist of the victim because "it was not traveling in a straight, true direction like it should be before it hit the chest." However, once that bullet entered the victim's chest, Dr. Griffin was able to physically trace its path through the body.

Appellant failed to demonstrate at trial any deficiency in Dr.Griffin's qualifications, or record, as a forensic pathologist. This is not a situation, as in Sanne v. State, wherein the State called a forensic pathologist to give "an expert opinion under a hypothetical fact situation based on evidence introduced," that the defendant would be a continuing threat to society. Sanne v. State, 609 S.W.2d, at 774. The evidence in the instant case established that Dr. Griffin had the professional expertise, based upon his knowledge, training (especially in tracing bullet paths), and experience as a forensic pathologist, to give his expert opinion. We find that Dr.Griffin was properly qualified to give his opinion on the path of the bullets. Mays v. State, 563 S.W.2d, at 263. Point of error fourteen is overruled.

In his fifteenth point of error, appellant argued that the trial court erred in admitting opinion testimony without a proper predicate by an unqualified witness. Appellant presented expert opinion testimony that he lacked the mental capacity to either understand the Miranda[3] warnings given to him, or to understand the nature of waiving his rights prior to signing his confession. In rebuttal, the State called LaQuetta Joy McLellan to testify.

McLellan had been appellant's teacher for four months in the Fall of 1983, approximately fourteen months prior to the commission of the instant offense. Her job had been to teach appellant in all subjects, including reading, English and writing. During school,

[3] Miranda v. Arizona, 384 U.S.436, 86 S.Ct.1602, 16 L.Ed.2d 694 (1966).

her class would sit at a round table and take turns reading and discussing what they had read. McLelland explained that on November 1, 1983, she overheard appellant at lunch discussing placing a classmate under a peace bond. According to McLellan, appellant represented that he knew what he could do and what he could not do, and that he knew the law and his rights. McLellan testified that she believed appellant was able to read and comprehend what he had read, that he was aware of the society and community in which he lived, and that he was "very streetwise."

The State then asked McLellan to answer a hypothetical as to appellant's ability to understand the Miranda warnings which were read to him prior to the signing of his confession. Appellant objected, after the hypothetical facts were set out and before McLellan was asked for her opinion, that the hypothetical required "an expert's testimony in order to be answered and I don't think [the State] has proved this witness to be an expert." The trial court overruled appellant's objection.

McLellan testified that she believed, based on her experience teaching appellant, talking to him in the classroom, and observing him interacting with other students, that appellant understood that he did not have to give a statement to the police, that he understood that he had a right to remain silent, that he understood he had the right to have a lawyer present to help him, and that he understood that by signing the statement he was voluntarily giving up his rights.[4] Appellant complains this testimony from McLellan was inadmissible because the State failed to establish the predicate that McLellan was an expert witness.

[4] Appellant's expert witnesses acknowledged that, in their opinions, appellant was capable of understanding some of the warnings being given to him. Dr. Curt Wills, a psychologist, testified that appellant would have understood the right to remain silent. Donna Thomasson, an educational diagnostician, explained that even though appellant would not understand the complete meaning of the whole thing, he would understand the fact that he was giving up his rights.

At the time of appellant's trial, the principle which controls this question was that the opinion or inference of a lay witness was not to be received unless it received substantial added value from the witness' observations. Ray, Law of Evidence, §1399, 2 Texas Practice 21 (3d Ed. 1980). This represented a movement by the courts away from the common-law rule enjoining lay witnesses from expressing opinions, a rule of "dubious origins" and which was "greatly criticized." Goode, Wellborn & Sharlot, Texas Rules of Evidence: Civil and Criminal, § 701.2, 33 Texas Practice 490.[5] McLellan's perceptions and personal knowledge of appellant, derived from her experience as appellant's teacher, provided sufficient added value to the opinions which the trial court permitted her to give to the jury.[6] A lay person's opinion is admissible if based upon such perceptions and personal knowledge. East v. State, 702 S.W.2d 606, at 613 (Tex.Cr.App. 1985), cert.denied 474 U.S.1000, 106 S.Ct.418, 88 L.Ed.2d 368 (1985). We hold the trial court did not err when it admitted the testimony of McLellan. Appellant's fifteenth point of error is overruled.

In his sixteenth point of error appellant contends that the evidence was insufficient to support an affirmative finding that there is a probability that appellant would commit criminal acts of violence that would constitute a continuing threat to society. TEX. CODE CRIM.PROC.ANN. Art. 37.071(b)(2). Appellant argues that the State failed to meet its burden of proof because its expert witness at punishment, psychiatrist Dr. Jerome Brown, testified that

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[5] TEX.R.CRIM.EVID. Rule 701 (eff. Sept. 1, 1986) codified the rule for admission of opinion testimony by lay witnesses. When a lay witness gives his or her opinion or inference, that testimony is to be limited to opinions or inferences which are "rationally based on the perception of the witness."

[6] The trial court sustained appellant's objections to, and barred McLellan from testifying in reference to, her opinions of appellant's ability to consciously kill somebody and appellant's capability of forming a conscious objective or desire to shoot and kill someone with a gun. These two opinions, unlike appellant's ability to comprehend the written and spoken word, do not derive added value from McLellan's experience as appellant's teacher.

appellant's aggressiveness would wane as he aged, making appellant less and less of an aggressive threat to society.

In assessing the sufficiency of the evidence to support an affirmative finding to the second special issue, we review all of the trial evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have made the finding beyond a reasonable doubt. Fierro v. State, 706 S.W.2d 310, 320 (Tex.Cr.App. 1986); Landry v. State, 706 S.W.2d 102, 112 (Tex.Cr.App. 1986); Carter v. State, 717 S.W.2d 60, 68 (Tex.Cr.App. 1986); Smith v. State, 676 S.W.2d 379, 393 (Tex.Cr.App. 1986), and Pyles v. State, 755 S.W.2d 98, 122 (Tex.Cr.App. 1988).

The jury may consider in answering the punishment issues all the evidence adduced at the guilt stage of the trial. Cannon v. State, 691 S.W.2d 664 (Tex.Cr.App. 1985); Green v. State, 682 S.W.2d 271, at 287-288 (Tex.Cr.App. 1984). The circumstances of the offense and the facts surrounding it may furnish greater probative evidence than any other evidence regarding the second special issue submitted at the penalty stage of a capital murder case. Green, supra; and cases cited therein. Each case must be decided on its own merit. Cannon v. State, 691 S.W.2d, at 679. The role of the reviewing court is not that of a "thirteenth" juror, reweighing the evidence, but rather the appellate court acts only as a final due process safeguard, ensuring the rationality of the factfinder. Moreno v. State, 755 S.W.2d 866, at 867 (Tex.Cr.App. 1988).

The facts of the instant case show that appellant entered the store with the intention of robbing the attendant so that he could obtain the money that he needed to pay his bondsman. Appellant took his father's .22 pistol with him to use in the commission of the robbery. When appellant ordered the attendant to give him the money, he lifted his shirt and showed the gun. After the attendant had already given appellant the money, appellant ordered her into the storage room. When they got into the storage room, appellant

pulled the gun from his pants and pointed it at the attendant. The attendant pleaded for her life. In his confession, appellant stated the gun discharged the first time when the attendant tried to push the gun away. Evidence at trial showed that the attendant died from four point-blank gun shot wounds from the .22. Appellant threw his coat into the bushes as he ran from the store.

These facts establish that appellant coolly planned and carried out a robbery of a defenseless woman. He acted without being under the influence or domination of anyone else, and armed himself prior to entering the store. These facts are probative of future dangerousness. Duffy v. State, 567 S.W.2d 197, at 207-208 (Tex.Cr.App. 1978); and Livingston v. State, 739 S.W.2d 311, at 339-340 (Tex.Cr.App. 1987). The attendant willingly complied with each of appellant's orders. The fact that appellant forced the attendant into a storage room, waited till then to pull his gun and point it at her, and shot her four separate times is indicative of appellant having a callous and wanton disregard for life. Though these facts represent strong support on their own for an affirmative answer to special issue number two, the State admitted other evidence at trial to support its argument that appellant represented a continuing threat to society.

Appellant had a history of assaultive behavior dating back to the time that he spent with the Texas Youth Council. In October of 1981, while in the Brownwood State School attempted to assault his supervisor. In November of 1981, while still in the Brownwood State School, appellant struck another student in the throat. Other students then restrained appellant. In May of 1982, while in the Brownwood State School, appellant assaulted one of his teachers, striking her in the jaw hard enough to knock her down and require her to go to the hospital. Later that day, when appellant was moved to lockdown for the assault, he attempted to strike another teacher in the head with a belt buckle. In September of 1982, appellant was

in the Giddings State School when he assaulted his teacher by throwing a book at him. In December of 1982, while still at the Giddings State School, appellant attacked another student and after being separated, appellant threatened to physically assault his house parent.

The State proved that, after the commission of the instant offense, appellant continued to exhibit violent tendencies. An Orange County Jail nurse testified that in January of 1985, while appellant was incarcerated pending the instant trial, he demanded that she put him on the doctor's list. Appellant then said that as soon as he got back out on the streets, he would kill her. When one of the jailers spoke to appellant about his threat to the nurse, appellant attempted to assault the jailer. After appellant was restrained and returned to his cell, he threatened to shoot the jailer "right between [his] _____-_____ eyes." Appellant told the jailer, "that he would beat this rap and when he hit the streets, I was a dead man, he would shoot me."

The State called four witnesses to give their opinions about appellant's character. Robert Ford was appellant's case worker in 1983 and his parole officer from June through September, 1984. Based on his experience with appellant, Ford believed that appellant had an "arrogant and volatile attitude towards people and rules." Ford also believed it was probable that appellant "would commit criminal acts of violence that would constitute a continuing threat to society." Erika Olson was a dorm director for the Texas Youth Council in the Fall of 1983 when he worked with appellant. Olson stated that appellant could never "see that he owned any responsibility for his actions." Frank McCoy was an Orange County juvenile probation officer when he began to work with appellant in 1980. He knew appellant until the time of appellant's trial in 1985, by which time McCoy became an adult probation officer. In McCoy's opinion, appellant was a dangerous person who had grown

more aggressive towards other people as he grew older. Jacqueline McClintock was a counselor-diagnostician for the West Orange - Cove School District when she worked with appellant. She believed that appellant had behavior problems; that he displayed hostility towards authority and aggressiveness towards his peers.

Lastly, the State called Dr. Brown, its expert psychiatric witness. The record supports appellant's statement that Brown testified how appellant's aggressiveness would diminish as he entered middle age, much as any other person's would. Dr.Brown also gave his opinion that, based both upon his interview with appellant and the hypothetical set of facts put to him by the State, appellant has a sociopathic personality. To Dr. Brown, this means appellant would have problems with aggression and would show a pattern of threats and assaults towards other people. Dr. Brown explained that sociopaths, as a group, commit more crimes of violence against society than the average person.

Based upon the facts of the instant offense, upon appellant's history of assaultive and violent behavior before and after the instant offense, upon the witnesses who testified about appellant's bad character, and upon the testimony of the State's expert witness, we hold that there is sufficient evidence in the record to support any rational trier of fact in giving an affirmative answer to the second special issue. Duffy v. State, 567 S.W.2d 197; Cannon v. State, 691 S.W.2d 664; Fierro v. State, 706 S.W.2d 310; and Pyles v. State, 755 S.W.2d 98. Appellant's sixteenth point of error is overruled.

In his seventeenth point of error, appellant argues that the trial court erred when it denied his motion for a new trial. In his motion, appellant claimed that he had newly discovered evidence, previously unknown to him, which probably would have produced a different result on new trial. When reviewing a trial court's ruling on a motion for new trial, the standard of review is abuse

of discretion by the trial court. Reyes v. State, No. 1176-91, slip op., at 5 (Tex.Cr.App. February 3, 1993).

The evidence which appellant claims to have been newly discovered concerned the alleged existence of an accomplice. Noe Martinez, an investigator for the Orange County District Attorney's Office, testified at the hearing on the motion for new trial that, on the day that the jury returned its verdict at punishment, he heard from an informant. The informant told Martinez that "one of the Gosby boys was involved with [appellant] in the robbery." Martinez testified that he did not pass this information on to the prosecutors until he was able to determine which one of the four Gosby brothers the informant was referring to.

On the Wednesday of the week after the punishment verdict, the informant told Martinez that Gerald Wayne Gosby was the person rumored to have been appellant's accomplice. Martinez secured a statement from Gerald Gosby. In that statement, Gosby denied any involvement whatsoever with appellant in the commission of the instant offense. Appellant produced no evidence, aside from Martinez' hearsay account of the informant's tip, that linked Gerald Gosby as an accomplice to appellant's commission of the instant offense. Appellant claims this evidence was exculpatory.[7]

At the trial on the merits, the first State's witness was Officer Ernest Balka. Balka was the first policeman to arrive at the scene of the crime. He testified that when he drove up to the Get-N-Go store in response to an alarm call to dispatch, he saw an "elderly black male" finishing filling up his car with gas and driving off. In his efforts to determine, as quickly au possible, what transpired inside the store, Balka did not detain this person. Balka looked inside the store, saw no one, and began to look

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[7] In his brief, appellant claims the prosecutor admitted at the hearing on the motion for new trial that this evidence was exculpatory. The prosecutor merely stated that he would have turned it over to appellant, not that he believed it was exculpatory.

outside the store. When he came around the corner, he saw appellant walking cut of the store. At trial, appellant extensively cross-examined Balka about the unidentified "elderly black male." Appellant had the benefit of this evidence at trial.

In order to be awarded a new trial based on newly discovered evidence, appellant must show that the evidence was unknown to him at the time of the trial. Boyett v. State, 692 S.W.2d 512, at 516 (Tex.Cr.App. 1985). In the instant case, appellant claims the fact that he had an accomplice (that Gerald Gosby was involved with him) was not known to him during his trial. We find this argument to be very unconvincing.

The allegation that he had an accomplice implies that appellant knew of the existence of his accomplice at the time he committed the instant offense, and at all times subsequent to the commission of the crime. If Gerald Gosby was actually involved with appellant in the commission of the instant offense, then the matter of his participation with appellant in the robbery-murder was certainly known to appellant at the time of trial. Even if Gosby had admitted that he was involved with appellant, instead of denying any participation, this testimony would not have addressed any relevant facts to which appellant was not privy. We conclude that the claimed involvement of Gerald Gosby fails to meet the requirement for being newly discovered or newly available evidence. Drew v. State, 743 S.W.2d 207, at 226-227 (Tex.Cr.App. 1987); Honea v. State, 585 S.W.2d 681, at 687 (Tex.Cr.App. 1979); and see, also, Tate v. State, 834 S.W.2d 566, at 571 (Tex.App.-- Houston [1st Dist.] 1992)(review refused, Oct. 14, 1992). The trial court did not abuse its discretion in denying appellant's motion for a new trial. Drew, Id.; and Honea, Id. Appellant's seventeenth point of

error is overruled.

The judgment of conviction and sentence of death are affirmed.

PER CURIAM

(Delivered May 5, 1993)

Do Not Publish

Clinton, J., dissents

Overstreet, J., concurs in the result

Supreme Court, U.S.
FILED
FEB 25 1994
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ORIGINAL

No. 93-6047

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1993

BOBBY JOE WILLS,
Petitioner,

v.

THE STATE OF TEXAS
Respondent.

On Petition for Writ of Certiorari
To the Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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14 pp

QUESTION PRESENTED

Whether the Court has jurisdiction to review Wills' claims which were neither properly presented to nor addressed by the court below

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent[1] herein, by and through the Attorney General of Texas, and files this Brief in Opposition.

OPINIONS BELOW

On May 5, 1993, in an unpublished opinion, the Texas Court of Criminal Appeals affirmed Wills' conviction. On June 16 1993, the Court of Criminal Appeals denied without written order Wills' motion for rehearing. The opinion and notation of denial of rehearing are attached to the petition as Appendices A and C.

JURISDICTION

Wills seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1257.

[1] For clarity, the petitioner will be referred to as "Wills."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Wills bases his claims upon the Eighth and Fourteenth Amendments to the United States Constitution. Also implicated are the former provisions of the capital sentencing statute, Article 37.071 of the Texas Code of Criminal Procedure (amended effective September 1, 1991).

STATEMENT OF THE CASE

The state has lawful custody of Wills pursuant to a judgment and sentence of the 260th Judicial District Court of Orange County, Texas, in D-850134, styled *the State of Texas v. Bobby Joe Wills*. On March 27, 1985, Wills was indicted for the offense of capital murder of Judy Bracewell while in the course of committing and attempting to commit robbery.

The guilt-innocence phase of the trial began on May 9, 1985;. On May 14, 1985, the jury found Wills guilty of the capital offense. After hearing additional evidence in the punishment hearing, on May 16, 1985, the jury answered affirmatively the special issues submitted pursuant to Article 37.071 of the Texas Code Criminal Procedure (amended effective September 1, 1991). Consequently, the trial court assessed a death sentence in accordance with state law.

Wills appealed this conviction and sentence to the Texas Court of Criminal Appeals, which affirmed in an unpublished opinion on May 5, 1993. (Appendix B to the petition). On May 24, 1993, Wills filed a motion for rehearing, which was denied on June 16. 1993. (Appendices A & C to the petition).

SUMMARY OF ARGUMENT

Wills delineates two challenges to his sentence neither one of which was properly presented to or addressed by the Texas Court of Criminal Appeals. For this reason, the Court should deny certiorari jurisdiction.

REASONS FOR DENYING THE WRIT

I.

THE COURT DOES NOT HAVE JURISDICTION TO REVIEW WILLS' CLAIMS WHICH WERE NEITHER PROPERLY PRESENTED TO NOR ADDRESSED BY THE COURT BELOW.

Citing *Penry v. Lynaugh*, 492 U.S. 302 (1989), Wills claims that punishment phase jury instructions and special issues were inadequate to allow the jury to give effect to his mitigating evidence. This claim was not timely or properly raised in the Court of Criminal Appeals because, as Wills concedes, it was first presented in a motion for rehearing.[2] Moreover, in his motion for rehearing, Wills did no more than refer the Court of Criminal Appeals to *Penry* with a statement that his case "contained" the specific issues raised by Penry and should be reversed. The state court did not entertain the claim but denied rehearing. Consequently, it is not properly before the Court for review on writ of certiorari.

The cases are both legion and long-standing that the Court will not decide issues raised for the first time on petition for certiorari or appeal and that the Court will not decide federal questions not raised properly and decided in the court below. *E.g., Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 218-22 (1983); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Hill v. California*, 410 U.S. 797, 805-06 (1971); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). To properly invoke the Court's jurisdiction, it is crucial that the federal question not only be raised in the prior proceedings, but that it be raised at the proper point. *Beck v. Washington*, 369 U.S. 541, 550 (1962); *Godchaux Co., Inc. v. Estopinal*, 251 U.S. 179, 181 (1919). "[W]hen 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.'" *Bd. of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 550 (1987), *quoting Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983) (further citations omitted).

Moreover, raising a federal question for the first time in a motion for rehearing addressed to the highest state court is insufficient to invoke Supreme Court jurisdiction unless the court below actually entertains and expressly decides the question. *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945); *see also Hanson v. Denckla*, 357 U.S. 235, 243-44 (1958); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935); *American Surety Co. v. Baldwin*, 287 U.S. 156 (1932); *Forbes v. State Council*, 216 U.S. 396 (1910); *Simmerman v. Nebraska*, 116 U.S. 54 (1885). To merit Supreme Court review, the order denying the petition must be more than a cursory recitation that the petition has been considered and denied; rather, there must be language in the order that in some way reflects that the state court "exerted its jurisdiction in such a way that the cases could have been brought here had the questions been raised prior to the original disposition." *Radio Station WOW*, 326 U.S. at 128; *Hathorn v. Lovorn*, 457 U.S. 255, 265 n.15 (1982).

Wills does not demonstrate that his claim under *Penry* was properly presented to the Court of Criminal Appeals or that the state court actually passed upon it. In Texas, the general rule is that a defendant may seek rehearing only of issues that were presented prior to the appellate court's disposition of the case, unless the appellate court finds that the ends of justice require consideration of a new claim. *E.g., Rochelle v. State*, 791 S.W.2d 121, 124-25 (Tex. Crim. App. 1985). The Court of Criminal Appeals adhered to the general rule when it denied rehearing instead of affirmatively entertaining the belatedly injected claim.

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[2] In a footnote, the Court of Criminal Appeals noted that Wills had not raised a point of error under *Penry v. Lynaugh*, 492 U.S. 302 (1989), and had offered evidence of mental retardation only to establish that he did not understand his rights prior to giving his confession.

Indeed, Wills did not attempt to raise this claim until after the Court of Criminal Appeals decided his appeal, despite the fact that *Penry* was announced four years prior to the decision below.

Relying on *Eddings v. Oklahoma*, 455 U.S. 104, 113 n.9 (1982), and *Wood v. Georgia*, 450 U.S. 261 (1981), Wills argues that the Court should exercise certiorari jurisdiction over his *Penry* claim despite the fact that it was not properly raised in the court below. Both cases are inapposite. In *Eddings*, the Court did not purport to consider a constitutional question that had not been presented to the highest state court, but rather noted that, although Eddings had not relied on *Lockett v. Ohio*, 438 U.S. 586 (1978), in the court below, the "*Lockett* issue" was subsumed in Eddings challenge to his sentence. Further, Eddings did rely on *Lockett* in his petition for rehearing and the Oklahoma Court of Criminal Appeals expressly stated that it had been fully considered. In Wills' case, however, the Court of Criminal Appeals did not purport to address any state or federal constitutional challenge to Wills' sentence, because no such challenge was raised in a procedurally correct manner.

Wills' reliance on *Woods* is also misplaced. *Woods* is an extraordinary case presenting unique circumstances that compelled the Court's decision. The Court initially granted certiorari review of an equal protection challenge to the practice of imprisoning probationers who could not afford to pay installments on fines. *Id.* at 264. However, the record revealed an apparent and serious conflict of interest, repeatedly raised in state court by the prosecutor, between indigent criminal defendants--employees of an "adult" bookstore and theater--and the employer business entities that retained defense counsel. The employer had a strong economic incentive to pursue the equal protection issue, because a favorable ruling would allow it to discontinue a practice of paying fines assessed against its employees, and the entire conduct of state proceedings suggested that the defense

attorney abandoned the employees' interests to facilitate litigation of that question. By reversing on the basis of the apparent conflict, rather than on the question presented for review, the Court not only protected the rights of the hapless defendants, but also preserved its own integrity.

Wills' case presents nothing that even remotely approaches the complete breakdown of the adversary process that took place in *Wood*. Wills' counsel at trial and on appeal did not labor under a conflict of interest that might have caused them to forego the actual and proper presentation of a claim in the state courts. Accordingly, there is no reason for the Court to treat the second certiorari question as one fairly raised below, when in fact it was not.

Wills also claims that it violates the Eighth Amendment to execute a mentally retarded person who was a juvenile at the time of his trial. Wills expressly recognizes that this claim was not raised below. For the reasons delineated supra, it follows that Wills second claim is not a proper subject of the Court's certiorari jurisdiction.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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DAN MORALES
ATTORNEY GENERAL

February 25, 1994

The Honorable William K. Suter
Clerk, United States Supreme Court
Office of the Clerk
1 First Street, N.E.
Washington, D.C. 20543

Re: *Bobby Joe Wills v. The State of Texas*, No. 93-6047

Dear Mr. Suter:

Enclosed for filing with the papers in the above styled cause are the original and nine copies of Respondent's Brief in Opposition. Also enclosed is the Proof of Service Form. Please indicate the date of filing on the enclosed copy of this letter and return it to me in the post-paid envelope provided.

By copy of this letter, I am forwarding a copy of said brief to counsel for Petitioner.

Thank you for your kind assistance in this matter.

Yours truly,

MARGARET PORTMAN GRIFFEY
Assistant Attorney General
(512) 463-2080

MPG/skw
Enclosures
c: Mr. Michael B. Charlton
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No. 93-6047

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PROOF OF SERVICE

I hereby certify that on the 25th day of February, 1994, one copy of Respondent's Brief in Opposition was mailed, postage prepaid, to Mr. Michael B. Charlton, Attorney at Laww, 550 Westcott, No. 320, Houston, Texas, 77007. All parties required to be served have been served. I am a member of the Bar of this Court.

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SUPREME COURT OF THE UNITED STATES

BOBBY JOE WILLS *v.* TEXAS

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 93-6047. Decided May 16, 1994

The petition for a writ of certiorari is denied.

JUSTICE O'CONNOR, concurring in the denial of the petition for a writ of certiorari.

As JUSTICE BLACKMUN details, *post*, at 1–3, petitioner appears to have a strong claim under *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), that the jury at his capital sentencing trial was unable to give mitigating effect to his mental retardation. It has been the traditional practice of this Court, however, to decline to review claims raised for the first time on rehearing in the court below. See *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120, 128 (1945) ("Questions first presented to the highest State court on a petition for rehearing come too late for consideration here, *unless* the State court exerted its jurisdiction [over them on rehearing]") (emphasis added). Following this practice here makes good sense because we do not have the benefit of a decision analyzing the application of *Penry* to the facts of petitioner's case. Petitioner is free to bring his *Penry* claim to the attention of the Texas courts in a postconviction proceeding. See *Ex parte Kunkle*, 852 S. W. 2d 499, 502, n. 3 (Tex. Crim. App. 1993) (*Penry* claims are cognizable in state habeas despite an applicant's failure to raise them on direct appeal). If he is unsuccessful in state court, petitioner can proceed to federal court and petition for a writ of habeas corpus. Because these avenues of relief are sufficient to afford full review of petitioner's substantial constitutional claim, I concur in the denial of the petition for a writ of certiorari.

JUSTICE BLACKMUN, dissenting.

Petitioner Bobby Joe Wills, a mentally retarded capital defendant who was 17 at the time of his offense, was sentenced to death in Texas without the jury's being allowed to give mitigating effect to his mental impairment. Petitioner's death sentence thus was imposed in direct violation of *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), and is devoid of the reliability the Constitution requires before death can be the appropriate punishment. See *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.).

Petitioner has an IQ of 61.[1] At his trial in 1985, petitioner's counsel introduced evidence of petitioner's mental retardation to challenge only the reliability of his confession and his *mens rea* to commit the offense. At the close of the guilt phase, the prosecutor admonished the jury not to "have any sympathy for the defendant because he's a little slow or he's borderline mentally retarded . . . Don't say 'Poor Old Bobby Joe, he's a little slow, he's borderline mentally retarded. Let's give him a break." Pet. for Cert. 10. At the penalty phase, the jurors were asked to answer Texas' two standard "special issues": "Did [Wills] act deliberately when he murdered . . . ? Is there a probability that he will be dangerous in the future?" See *Penry*, 492 U. S., at 320. The prosecutor repeatedly commanded the jurors to consider only these questions and reminded them: "You're not asked, 'Was the defendant given an unfair

[1]At the time of petitioner's trial, the American Association on Mental Retardation classified individuals with an IQ score between 50–55 and 70 as having "mild" retardation. See *Penry* v. *Lynaugh*, 492 U. S. 302, 308, n. 1 (1989). In 1992, the Association revised its classification to identify individuals with an IQ of 75 or below as presumptively retarded. See AAMR Mental Retardation: Definition, Classification, and Systems of Supports 14 (9th ed. 1992).

chance at life?'" Pet. for Cert. 11. After reviewing petitioner's unstable past, the prosecutor concluded that "all the counselors and all the psychologists and all the teachers and all the case workers and all the supervisors can't do anything for Bobby Joe Wills. *They can't rehabilitate Bobby Joe Wills.*" (Emphasis added). *Ibid.* The jury returned affirmative answers to both special issues and sentenced petitioner to death.

Penry v. *Lynaugh* was decided while petitioner's direct appeal was pending. Recognizing that mental retardation may render a defendant "less morally 'culpable than defendants who have no such excuse,'" 492 U. S., at 322, quoting *California* v. *Brown*, 479 U. S. 538, 545 (1987) (O'CONNOR, J., concurring), this Court held that Texas' execution of a mentally retarded defendant, without the jury's being instructed that it could consider and give mitigating effect to his mental impairment in imposing sentence, would violate the Eighth Amendment. A rational juror, this Court observed, readily could conclude that a mentally retarded capital defendant had killed deliberately and was likely to be dangerous in the future, while also concluding that mercy and the defendant's reduced culpability for the crime made his execution inappropriate. Texas' capital-sentencing scheme allowed a jury to give effect to the former conclusion but not the latter, and thus eliminated "a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson*, 428 U. S., at 304 (opinion of Stewart, Powell, and STEVENS, JJ.).

Like Penry, petitioner was condemned to die by the State of Texas without the jury's ever having had an opportunity to give a "reasoned *moral* response to the defendant's background, character, and crime." *Brown*, 479 U. S., at 545 (O'CONNOR, J., concurring). His sentence therefore runs the constitutionally intolerable risk that the death penalty has been imposed despite the presence of factors that may justify a sentence less

than death. See *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978) (opinion of Burger, C.J.).[2]

It is possible that petitioner's claims may be better addressed in state and federal post-conviction proceedings. Even if I did not believe that the death penalty cannot be fairly administered within the constraints of our Constitution, see *Callins* v. *Collins*, 510 U. S. ___, ___ (1994) (BLACKMUN, J., dissenting from denial of certiorari), however, because the execution of this mentally retarded juvenile offender would constitute a miscarriage of justice, I would grant the petition, vacate the death sentence, and remand for resentencing. I therefore dissent.

---

[2]Petitioner additionally claims that the execution of mentally retarded juvenile offenders is cruel and unusual punishment in violation of the Eighth Amendment. This Court has recognized that youth, like mental retardation, reduces a defendant's criminal culpability and may render the imposition of society's ultimate retributive sanction inappropriate. See, *e.g.*, *Eddings* v. *Oklahoma*, 455 U. S. 104, 115–116 (1982); *Thompson* v. *Oklahoma*, 487 U. S. 815 (1988) (striking death sentence for juvenile offender under age 16); but see *Stanford* v. *Kentucky*, 492 U. S. 361 (1989) (declining to declare capital punishment *per se* invalid for juvenile offenders age 16 or older). That such executions violate society's "evolving standards of decency," *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion), is consistent, of course, with international practice, which condemns the execution of both the mentally disabled and juvenile offenders. At least 72 countries that *retain* the death penalty restrict its administration to persons age 18 or over at the time of the offense. Amnesty International, Open Letter to the President on the Death Penalty 8, n. 10 (1994). The United States thus "stands almost alone in the world in still executing offenders who were under-18 at the time of the crime." *Id.*, at 8. See generally W. Schabas, The Abolition of the Death Penalty in International Law (1993).